

SUPREME COURT OF INDIA

CIVIL WRIT PETITION 829 / 2013

IN THE MATTER OF:

S.G. VOMBATKERE & ANR.

...PETITIONERS

*Versus*

UNION OF INDIA & ORS.

...RESPONDENTS

COMPILATION

VOLUME III - C

INDIAN CASE - LAWS

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Submitted on behalf of the Petitioners

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c

(2011) 8 Supreme Court Cases 1

(BEFORE B. SUDERSHAN REDDY AND S.S. NIJJAR, JJ.)

RAM JETHMALANI AND OTHERS

.. Petitioners;

*Versus*

d

UNION OF INDIA AND OTHERS

.. Respondents.

Writ Petition (C) No. 176 of 2009<sup>†</sup> with IA No. 1 of 2009,  
SLP (C) No. 11032 of 2009, WPs (C) Nos. 37 of 2010 and 136 of 2011,  
decided on July 4, 2011

e A. Constitution of India — Arts. 32 and 144 — Black money case/Monies unaccounted for — Investigation — Special Investigation Team (SIT) headed by former Judges of Supreme Court — Constitution of, and monitoring of case by Supreme Court — Circumstances warranting

f — Unaccounted for/black money generated in India and deposited in foreign banks in foreign countries, involving various illegal activities like tax evasion, money-laundering, and having possible adverse effect on security of the Nation — Investigation by Government agencies concerned, although already started, proceeding very slowly and ineffectively — Some of such account-holders found to be defaulters of very large amounts of income tax with accounts running into Rs 40,000 to Rs 70,000 crores without corresponding lawful source of income — Their custodial interrogation undertaken only at behest of Supreme Court, leading to disclosure involving important persons like politically powerful leaders, international arms dealers and corporate giants

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— In such circumstances, formation of High-Level Committee (HLC) by Central Government to take charge of, and direct investigation, held, was not sufficient

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<sup>†</sup> Under Article 32 of the Constitution of India



— Hence, in view of Supreme Court's duty to uphold rule of law, and that it involved many Government departments/agencies, with international ramifications, held, for timely and urgent action Union of India to appoint Special Investigation Team (SIT) comprising, in addition to existing constituents of HLC, (i) Director, Research and Analysis Wing (RAW), and (ii) two former Judges of Supreme Court a

— Duties and responsibilities of said SIT specified with mandate to keep Supreme Court informed of all major developments by filing periodic status reports, and to follow any orders issued by Supreme Court — All organs, agencies, departments and agents of UoI and State Governments directed to extend all necessary cooperation to said SIT — Debt, Financial and Monetary Laws — Foreign Exchange Regulation Act, 1973 — S. 8 — Foreign Exchange Management Act, 1999 — Ss. 3, 4 and 13 — Prevention of Money-Laundering Act, 2002 — Ss. 3, 4, 17, 18, 50 and 52 — Income Tax Act, 1961 — Ss. 132, 132-A, 135 and 275-B — Commissions of Inquiry Act, 1952 — S. 3 — Formation of Commission — On facts, held, not sufficient b

B. Constitution of India — Arts. 32, 73, 142 and 144 — Executive or Legislative action/inaction or gaps — Orders/Directions redressing/filling — Executive inaction pertaining to financial/monetary crimes undermining rule of law itself and entire economic system of nation — Duty of Supreme Court to uphold rule of law — Black money generation and money laundering — Capture of State by special interest groups — Involvement of politically powerful leaders, international arms dealers and corporate bigwigs — Directions issued to redress inaction and for monitoring — Held, Supreme Court is bound to uphold Constitution and rule of law — Continued involvement of Supreme Court in these matters, in a broad oversight capacity, is necessary for upholding rule of law, and achievement of constitutional values — In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, retraction of monitoring of these matters by Supreme Court would be unconscionable — Rule of Law — Public Accountability and Vigilance — Vigilance Authorities — Supreme Court and High Courts c

C. Constitution of India — Art. 32 — Investigation — Special Investigation Team (SIT) headed by former Supreme Court Judges — Remuneration of such former Judges — Clarified that they would be entitled to their remuneration, allowances, perks, facilities as that of Judges of Supreme Court — Debt, Financial and Monetary Laws — Foreign Exchange Regulation Act, 1973, S. 8 d

The petitioners in the present writ petition filed under Article 32 of the Constitution alleged that various individuals, including citizens, non-citizens, and other entities with presence in India, had generated large sums of monies within India but illegally secreted away the same in various foreign banks in foreign countries. That those funds were thereafter laundered and brought back into India, to be used in both legal and illegal activities; that such transfer of funds across borders had very serious connotations for the security and integrity of India. e

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a That the Government of India, and its agencies, had been very lax in keeping watch on the various unlawful activities generating unaccounted monies and the consequent tax evasion. That the efforts to prosecute the guilty, to identify such monies in various foreign bank accounts, to bring back such monies, and to strengthen the governance framework to prevent further outflows of such funds, had been sorely lacking. Specifically, it was alleged that one *H* and his accomplices, *K* and *K*'s wife *C*, were served with income tax demands for very large sums of money. That although nearly four-and-half years ago, upon raiding the residence of *H* in Pune, certain documents had been discovered regarding b deposits of a large sum in a foreign bank, proper investigation into the matter and interrogation of the individuals concerned was not carried out. That the inaction of both Income Tax Department and the Enforcement Directorate in the matters concerning *H*, *K* and *C* appeared to be deliberately engineered, for nefarious reasons. Alleging such inaction to be violative of Articles 14 and 21, the petitioners sought the Supreme Court to intervene, and monitor the investigative c processes by appointing a Special Investigation Team headed by a former Judge or two of the Supreme Court reporting directly to the Supreme Court.

The petitioners further contended that despite their demand under the Right to Information Act, 2005, the respondents had not disclosed to them various documents, including names and bank particulars relating to various bank accounts of Indian citizens in Liechtenstein. That although Germany had secured d the names of a large number of account-holders of banks in Liechtenstein along with the particulars of such accounts, and offered the information regarding nationals and citizens of other countries to such countries, the Union of India never made a serious attempt to secure such information or to proceed to investigate such individuals.

e The Union of India contended, inter alia, that they had secured the said information pursuant to an agreement with Germany for avoidance of double taxation and prevention of fiscal evasion; and that the said agreement prevented the Union of India from disclosing the same even in proceedings before the Supreme Court.

Issuing the directions below and directing the matter to be listed again for further directions, the Supreme Court

f *Held :*

g It is necessary to express the Supreme Court's serious reservations about the responses of the Union of India. During the earlier phases of hearing, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by the Supreme Court, did the Union of India begin to admit that indeed the investigation was proceeding very slowly. In fact the investigation had completely stalled, inasmuch as custodial interrogation h of *H* had not even been sought for, even though he was very much resident in India. Further, even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician. The lack of seriousness in the efforts of the State authorities are contrary to the requirements of laws and constitutional obligations of the Union of India. It was only upon the insistence and intervention of the Supreme Court that the Enforcement Directorate initiated and secured custodial interrogation over *H*.  
(Paras 40, 41 and 25)

During the continuing interrogation of *H, K* and *C*, undertaken for the first time at the behest of the Supreme Court, many names of important persons, including leaders of some corporate giants, politically powerful people, and international arms dealers have cropped up. So far, no significant attempt has been made to investigate and verify the same. This is a further cause for the grave concern of the Supreme Court, and points to the need for continued, effective and day-to-day monitoring by an SIT constituted by the Supreme Court, and acting on behalf, behest and direction of the Supreme Court. (Para 42)

Although the Enforcement Directorate has moved in some small measure, the situation has not changed to the extent that it ought to, so as to accept that the investigation would now be conducted with the degree of seriousness that is warranted. According to the Union of India, a High-Level Committee (HLC) was formed in order to take charge of and direct the entire investigation, and subsequently, the prosecution, and a charge-sheet had been filed against *H*. The fact was that the charge-sheet had not been given even for the perusal of the HLC, let alone securing its inputs, guidance and direction. A nodal agency was set up pursuant to directions of the Supreme Court in *Vineet Narain case*, (1996) 2 SCC 199. Yet, for unknown reasons, the same was not involved and these matters were never placed before it. (Para 44)

*Vineet Narain v. Union of India*, (1996) 2 SCC 199 : 1996 SCC (Cri) 264, referred to

The Union of India had obtained knowledge, documents and information that indicated possible connections between *H*, and his alleged co-conspirators and known international arms dealers. The volume of alleged income tax owed to the country, as demanded by the Union of India itself, and the volume of monies, by some accounts is about Rs 40,000 crores by, and some other accounts in excess of Rs 70,000 crores, that are said to have been routed through various bank accounts of *H, K* and *C*. Further, from all accounts it has been acknowledged that none of the named individuals have any known and lawful sources for such huge quantities of monies. (Paras 47 and 48)

However, there is still no evidence of a really serious investigation into these other matters from the national security perspective. The formation of the HLC was a necessary and welcome step. Nevertheless, it is an insufficient step.

(Paras 49 and 50)

In the present matters, fragmentation of the Government, and expertise and knowledge, across many departments, agencies and across various jurisdictions, both within the country, and across the globe, is a serious impediment to the conduct of a proper investigation. It is in fact necessary to create a body that coordinates, directs, and where necessary orders timely and urgent action by various institutions of the State. Continued involvement of the Supreme Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values. However, it would be impossible for the Supreme Court to be involved in day-to-day investigations, or to constantly monitor each and every aspect of the investigation. (Para 52)

The Supreme Court is bound to uphold the Constitution. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by the Supreme Court would be unconscionable. (Paras 53 and 55)

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- The issue is not merely whether the Union of India is making the necessary effort to bring back all or some significant part of the alleged monies. The fact that there is some information and knowledge that such vast amounts may have been stashed away in foreign banks, implies that the State has the primordial responsibility, under the Constitution, to make every effort to trace the sources of such monies, punish the guilty where such monies have been generated and/or taken abroad through unlawful activities, and bring back the monies owed to the country. Although the degree of success, measured in terms of the amounts of monies brought back, is dependent on a number of factors, including aspects that relate to international political economy and relations, which may or may not be under our control. The fact remains that with respect to those factors that were within the powers of the Union of India, such as investigation of possible criminal nexus, threats to national security, etc., were not even attempted. Fealty to the Constitution is not a matter of mere material success; but, and probably more importantly from the perspective of the moral authority of the State, a matter of integrity of effort on all the dimensions that inform a problem that threatens the constitutional projects. Further, the degree of seriousness with which efforts are made with respect to those various dimensions can also be expected to bear fruit in terms of building capacities, and the development of necessary attitudes to take the law enforcement part of accounting or following the money seriously in the future. The protection of the Constitution and striving to promote its vision and values is an elemental mode of service to the people of India.
- (Paras 54, 55 and 25)

- In many instances, in the past, when issues referred to the Supreme Court have been very complex in nature, and yet required the intervention of the Supreme Court, Special Investigation Teams have been ordered and constituted in order to enable the Supreme Court, and the Union of India and/or other organs of the State, to fulfil their constitutional obligations.
- (Para 56)

*Vineet Narain v. Union of India*, (1996) 2 SCC 199 : 1996 SCC (Cri) 264; *NIIRC v. State of Gujarat*, (2004) 8 SCC 610; *Sanjiv Kumar v. State of Haryana*, (2005) 5 SCC 517; *Centre for Public Interest Litigation v. Union of India*, (2011) 1 SCC 560 : (2011) 1 SCC (Cri) 463, followed

- [Ed.: See also Constitution of India, Art. 32, '(e)(6)(x) Exercise of power under by Supreme Court Executive or Legislative action/inaction or gaps — Orders/directions redressing/filling', pp. 579 et seq., and

'(e)(6)(xviii) Exercise of power under by Supreme Court — Statutory authority/body — Conferral of jurisdiction beyond purview of its statutory jurisdiction/function', pp. 600 et seq. in Vol. 7, *Complete Digest of Supreme Court Cases*, 2nd Edn.]

- Accordingly, the Union of India is directed to issue appropriate notification and publish the [directions given in para 57 of the judgment]. The former Judges of the Supreme Court so appointed to supervise the SIT are entitled to their remuneration, allowances, perks, facilities as that of the Judges of the Supreme Court. The Ministry of Finance, Union of India, shall be responsible for creating the appropriate infrastructure and other facilities for proper and effective functioning of the SIT at once.
- (Paras 57 and 58)

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D. Constitution of India — Arts. 32(1) & (2), 226, 19(1)(a) & (2) and 21 — Enforcement of fundamental rights — Burden of proof — Right to know/right to information — Extent of — Special relationship between Art. 19(1)(a) and Art. 32 — Exercise of right to know as a means to effectively enforce fundamental rights under Art. 32 — Balancing right to know/right to information of petitioners versus right to privacy of persons concerned — In petition seeking protection of fundamental right(s), held, State cannot be an adversary — Burden of protection of fundamental right is duty of State — Hence, except as provided in Art. 19(2) or elsewhere in Constitution, held, State has duty, generally, to reveal all facts and information in its possession to Court as well as to petitioner — Public Accountability and Vigilance — State as a Litigant/Party — Evidence Act, 1872, Ss. 101 to 103

E. Constitution of India — Arts. 32(1) & (2), 19(1)(a) & (2), 21 and 368 — Enforcement of fundamental rights — Balancing right to know/right to information of petitioners versus right to privacy of persons concerned — Right to know — Extent of — Special relationship between Art. 19(1)(a) and Art. 32 — Exercise of right to know as a means to effectively enforce fundamental rights under Art. 32 — Black money case — Writ petition seeking protection of fundamental rights — Obligation of State to furnish, and right of writ petitioners to obtain, information necessary for articulating and substantiating the case and be heard — Its scope and limitations

— In present case, writ petitioners alleging illegal secreting away in foreign banks in foreign countries, of money generated in India by Indians through means not known and subsequent laundering thereof involving tax evasion and various illegal activities at both stages — Alleging that Germany had secured names and bank particulars of a large number of Indian account-holders of banks in a third country Z and offered to disclose the same, Union of India neither made any serious attempt to investigate such account-holders nor did it disclose the said information to writ petitioners who had demanded the same under the Right to Information Act, 2002, the petitioners seeking investigation into said matters by Special Investigation Team (SIT) appointed herein — Union of India admitting to have obtained the said information under Indo-German Double Taxation Avoidance Agreement (DTAA) but pleading that DTAA barred it from disclosing the same even in proceedings before Supreme Court

— On detailed examination of DTAA, contention of Union of India, rejected — Further held, since Arts. 32(1) & (2) are parts of basic structure of Constitution and, therefore, not amendable — So Union of India could not deny the writ petitioners herein, information necessary to articulate their case under Art. 32, especially when such information was in its possession — However, such right of petitioners does not extend to their assuming of role of inquisitor against fellow citizens and thereby violate rights of latter under Art. 21 — Hence, revelation of details of accounts of individuals in foreign banks in the absence of prima facie grounds to accuse them of any wrongdoing, held, not permissible

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- Therefore, balancing these rights, detailed directions issued to Union of India for disclosure of documents and information available to the extent specified — Relationship between Art. 32(1) and Art. 19(1)(a) pointed out — Human and Civil Rights — Right to Information Act, 2005 — Ss. 3 to 8 — Right to information — Limitations
- a** F. Income Tax — Double Taxation — Indo-German Double Taxation Avoidance Agreement (DTAA) — Art. 26 — Bar of secrecy under — Scope and interpretation of — Word “information”, and phrase “public court proceedings” — Held, said bar is not absolute — Word “information”, occurring therein, held, does not cover information secured by Germany from a third nation-State and shared with India having no bearing upon matters covered by the said agreement — Held, proceedings under Art. 32 of Constitution in present case before Supreme Court, held, were “public court proceedings” within meaning of Art. 26(1), DTAA which itself permitted disclosure of “information” in such proceedings — Reiterating and applying “General Rule of Interpretation” contained in Art. 31, Vienna Convention on the Laws of Treaties, 1969, real scope of said phrase, explained — Further held, principle of comity of nations could not be applied to restrict said provision to tax matters only as the same would render last sentence of Art. 26(1) DTAA redundant — Vienna Convention on the Law of Treaties, 1969 — Art. 31 — Right to Information Act, 2005 — Ss. 3 to 8 — Income Tax Act, 1961, S. 90 (Paras 65 to 73)
- b** G. Constitution of India — Arts. 368, 32(1) & (2), 19(1) & (2) and 21 — Basic structure — Particular instances — Arts. 32(1) & (2), reiterated, are parts of basic structure of Constitution which is not amendable — Constitutional Law — Basic features or structure of Constitution
- c** H. Constitutional Law — Grant and Separation of powers — Generally — Limitations on exercise of power — Powers vested by Constitution in any organ of State, held, have to be exercised within four corners of the Constitution — None of such organs can change identity of Constitution itself
- d** I. Constitution of India — Pt. III and Art. 21 — Responsibility of State in respect of fundamental rights, such as right to privacy — Scope — Held, it is not limited to refraining from derogating from fundamental rights but extends to upholding them against action of others in the society, even in exercise of fundamental rights by such others
- e** J. Constitution of India — Pt. III and Art. 32 — Enforcement of fundamental rights — Making exceptions — Dangers inherent therein and slippery slope of exceptions, pointed out — Held, there is an inherent danger in making exceptions to fundamental principles and rights — Those exceptions, bit by bit, would then eviscerate content of main right itself — Moreover, same logic could then be used by State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale
- f**
- g**
- h**

K. Constitution of India — Arts. 21 and 19(1)(a) — Right to privacy — Financial/Bank account details, etc. — Scope of protection available in respect of — Balancing right to know/information of petitioners versus right to privacy of persons concerned — Held, revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrongdoing, would be a violation of their right to privacy — It is only after State has been able to arrive at a prima facie conclusion of wrongdoing, based on material evidence, would rights of others in the nation to be informed, enter the picture — Right to know cannot be extended to being inquisitors of fellow citizens

*Held :*

Modern constitutionalism specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a Constitution cannot change the identity of the Constitution itself.

(Para 73)

The basic structure of the Constitution cannot be amended even by the amending power of the legislature. Articles 32(1) and 32(2) are parts of the basic structure of the Constitution. In order that the right guaranteed by Article 32(1) be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State.

(Paras 44 and 75)

Although the burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, the burden of protection of fundamental rights is primarily the duty of the State. Consequently, unless constitutional grounds exist, the State may not act in a manner that hinders the Supreme Court from rendering complete justice in such proceedings. Withholding of information from the petitioners, or seeking to cast the relevant events and facts in a light favourable to the State in the context of the proceedings, even though ultimately detrimental to the essential task of protecting fundamental rights, would be destructive to the guarantee in Article 32(1), and substantially eviscerate the capacity of the Supreme Court in exercising its powers contained in Article 32(2), and those traceable to other provisions of the Constitution and broader jurisprudence of constitutionalism, in upholding fundamental rights enshrined in Part III.

(Para 77)

In the task of upholding of fundamental rights, the State cannot be an adversary. The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision-making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights.

(Para 78)

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- a Furthermore, there is a special relationship between Article 32(1) and Article 19(1)(a), which guarantees citizens the freedom of speech and expression. The very genesis, and the normative desirability of such a freedom, lies in historical experiences of the entire humanity: unless accountable, the State would turn tyrannical. A proceeding under Article 32(1), and invocation of the powers granted by Article 32(2), is a primordial constitutional feature of ensuring such accountability. The very promise, and existence, of a constitutional democracy rests substantially on such proceedings. (Para 79)
- b Withholding of information from the petitioners by the State, thereby constraining their freedom of speech and expression before the Supreme Court, may be premised only on the exceptions carved out, in Article 19(2) or by law that demarcate exceptions, provided that such a law comports with the enumerated grounds in Article 19(2), or that may be provided for elsewhere in the Constitution. (Para 80)
- c The actions of Governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from. The redundancy, that the Union of India presses, with respect to the last sentence of Article 26(1) of the Double Taxation Avoidance Agreement with Germany, necessarily transgresses upon the boundaries erected by the Constitution. It cannot be permitted. (Paras 81 and 65 to 73)
- d *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1, *relied on*
- e Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. The rights of citizens, to effectively seek the protection of fundamental rights, under Article 32(1) have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition the Supreme Court for upholding of fundamental rights is granted in order that citizens, *inter alia*, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others. (Paras 83 and 84)
- h An argument can be made that the Supreme Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted with the requisite speed and vigour in the case of large volumes of suspected unaccounted for monies of certain individuals. But, there is an inherent danger in making exceptions to fundamental principles



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and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself. Moreover, the same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale. (Paras 85 and 86) a

It is indeed true that the information shared by Germany, with regard to certain bank accounts in Liechtenstein, also contains names of individuals who appear to be Indians. However, while some of the accounts, and the individuals holding those accounts, are claimed to have been investigated, others have not been. No conclusion can be drawn as to whether those who have not been investigated, or only partially investigated and proceedings not initiated have committed any wrongdoing. In these circumstances, it would be inappropriate for the Supreme Court to order the disclosure of such names, even in the context of proceedings under Article 32(1). (Para 87) b

The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrongdoing, would be a violation of their rights to privacy. It is only after the State has been able to arrive at a prima facie conclusion of wrongdoing, based on material evidence, would the rights of others in the nation to be informed, enter the picture. In the event citizens, other persons and entities have credible information that a wrongdoing could be associated with a bank account, it is needless to state that they have the right, and in fact the moral duty, to inform the State, and consequently the State would have the obligation to investigate the same, within the boundaries of constitutional permissibility. If the State fails to do so, the appropriate courts can always intervene. (Para 88) c

The major problem, in the present matters, has been the inaction of the State with regard to the specific instances of *H*, *K* and *C*, and also with respect to the issues regarding parallel economy, generation of black money, etc. The failure is not of the constitutional values or of the powers available to the State; the failure has been of human agency. The response cannot be the promotion of vigilantism, and thereby violate other constitutional values. The response has to necessarily be a more emphatic assertion of those values, both in terms of protection of an individual's right to privacy and also the protection of individual's right to petition the Supreme Court, under Article 32(1), to protect fundamental rights from evisceration of content because of failures of the State. The balancing leads only to one conclusion—strengthening of the machinery of investigations, and vigil by broader citizenry in ensuring that the agents of State do not weaken such machinery. [Directions issued accordingly in para 90 of the judgment.] (Paras 89 and 90) d

**L. Debt, Financial and Monetary Laws — Generally — Money — Functions of — Increasing monetisation of social transactions — Potentially problematic nature of, for social order and responsibilities of State in that regard, pointed out — Foreign Exchange Management Act, 1999 — Ss. 3, 4 and 13 — Prevention of Money-Laundering Act, 2002, S. 1 (Paras 1 to 4)** e

**M. Taxation — Tax evasion — Black money — Unaccounted for monies generated in India by Indians, and transferred and accumulated in foreign banks — Risks to nation and to State, involved in, and role of State appropriate in that regard, pointed out — Prevention of Money-Laundering** f

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Act, 2002 — S. 3 — Income Tax Act, 1961 — S. 276-C — Jurisprudence —  
Role of State — Public goods — Provision of — Utilitarianism —  
a Application of — Constitution of India — Pts. III and IV — Role of State  
(Paras 8 to 24)

"The Failure and Collapse of Nation-States—Breakdown, Prevention and Repair" in  
Rotberg, Robert I. (Ed.), *When States Fail: Causes and Consequences* (Princeton  
University Press 2004), referred to

H-D/A/48223/CR

b Advocates who appeared in this case :

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Advocates] for the appearing parties.

d	Chronological list of cases cited	on page(s)
	1. (2011) 1 SCC 560 : (2011) 1 SCC (Cri) 463, <i>Centre for Public Interest Litigation v. Union of India</i>	27c
	2. (2005) 5 SCC 517, <i>Sanjiv Kumar v. State of Haryana</i>	27c
	3. (2004) 10 SCC 1, <i>Union of India v. Azadi Bachao Andolan</i>	32e
	4. (2004) 8 SCC 610, <i>NHRC v. State of Gujarat</i>	27c
e	5. (1996) 2 SCC 199 : 1996 SCC (Cri) 264, <i>Vineet Narain v. Union of India</i>	24d-e, 27c

ORDER

PART I

1. "Follow the money" was the short and simple advice given by the  
f secret informant, within the American Government, to Bob Woodward, the  
journalist from Washington Post, in aid of his investigations of the Watergate  
Hotel break-in. Money has often been claimed, by economists, to only be a  
veil that covers the real value and the economy. As a medium of exchange,  
money is vital for the smooth functioning of exchange in the marketplace.  
However, increasing monetisation of most social transactions has been  
g viewed as potentially problematic for the social order, inasmuch as it  
signifies a move to evaluating value, and ethical desirability, of most areas of  
social interaction only in terms of price obtained in the marketplace.

2. Price-based notions of value and values, as propounded by some  
extreme neoliberal doctrines, imply that the values that ought to be promoted,  
h in societies, are the ones for which people are willing to pay a price for.  
Values, and social actions, for which an effective demand is not expressed in

the market, are neglected, even if lip service is paid to their essentiality. However, it cannot be denied that not everything that can be, and is transacted, in the market for a price is necessarily good, and enhances social welfare. Moreover, some activities, even if costly and without being directly measurable in terms of exchange value, are to be rightly viewed as essential. a

3. It is a well-established proposition, of political economy, and of statecraft, that the State has a necessary interest in determining and influencing, the kinds of transactions and social actions, that occur within a legal order. From prevention of certain kinds of harmful activities, that may range from outright crimes, to regulating or controlling, and consequently mitigating socially harmful modes of social and economic production, to promotion of activities that are deemed to be of higher priority, than other activities which may have a lower priority, howsoever evaluated in terms of social utility, are all the responsibilities of the State. Whether such activities by the State result in directly measurable benefits or not is often not the most important factor in determining their desirability; their absence, or their substantial evisceration, are to be viewed as socially destructive. b c

4. The scrutiny and control of activities, whether in the economic, social or political contexts, by the State, in the public interest as posited by modern constitutionalism, is substantially effectuated by the State "following the money". In modern societies very little gets accomplished without transfer of money. The incidence of crime, petty and grand, like any other social phenomena is often linked to transfers of monies, small or large. Money, in that sense, can both power, and also reward, crime. As noted by many scholars, with increasing globalisation, an ideological and social construct, in which transactions across borders are accomplished with little or no control over the quantum, and mode of transfers of money in exchange for various services and value rendered, both legal and illegal, nation-States also have begun to confront complex problems of cross-border crimes of all kinds. Whether this complex web of flows of funds, instantaneously, and in large sums is good or bad, from the perspective of lawful and desired transactions is not at issue in the context of the matters before this Court. d e f

5. The worries of this Court that arise, in the context of the matters placed before us, are with respect to transfers of monies, and accumulation of monies, which are unaccounted for by many individuals and other legal entities in the country, in foreign banks. The worries of this Court relate not merely to the quantum of monies said to have been secreted away in foreign banks, but also the manner in which they may have been taken away from the country, and with the nature of activities that may have engendered the accumulation of such monies. The worries of this Court are also with regard to the nature of activities that such monies may engender, both in terms of the concentration of economic power, and also the fact that such monies may be transferred to groups and individuals who may use them for unlawful activities that are extremely dangerous to the nation, including actions against g h

a the State. The worries of this Court also relate to whether the activities of engendering such unaccounted for monies, transferring them abroad, and then routing them back to India may not actually be creating a culture that extols the virtue of such cycles, and the activities that engender such cycles are viewed as desirable modes of individual and group action.

b 6. The worries of this Court also relate to the manner, and the extent to which such cycles are damaging to both national and international attempts to combat the extent, nature and intensity of cross-border criminal activity.

c Finally, the worries of this Court are also with respect to the extent of incapacities, system-wide, in terms of institutional resources, skills and knowledge, as well as about incapacities of ethical nature, in keeping an account of the monies generated by various facets of social action in the country, and thereby developing effective mechanisms of control. These incapacities go to the very heart of constitutional imperatives of governance.

d Whether such incapacities are on account of not having devoted enough resources towards building such capacities, or on account of a broader culture of venality in the wider spheres of social and political action, they run afoul of constitutional imperatives.

e 7. Large amounts of unaccounted for monies, stashed away in banks located in jurisdictions that thrive on strong privacy laws protecting bearers of those accounts to avoid scrutiny, raise each and every worry delineated above. First and foremost, such large monies stashed abroad, and unaccounted for by individuals and entities of a country, would suggest the necessity of suspecting that they have been generated in activities that have been deemed to be unlawful. In addition, such large amounts of unaccounted for monies would also lead to a natural suspicion that they have been transferred out of the country in order to evade payment of taxes, thereby depleting the capacity of the nation to undertake many tasks that are in public interest.

f 8. Many schools of thought exist with regard to the primary functions of the State, and the normative expectations of what the role of the State ought to be. The questions regarding which of those schools provide the absolutely correct view cannot be the criteria to choose or reject any specific school of thought as an aid in constitutional adjudication. Charged with the responsibility of having to make decisions in the present, within the constraints of epistemic frailties of human knowledge, constitutional adjudicators willy-nilly are compelled to choose those that seem to provide a reasoned basis for framing of questions relevant, both with respect to law, and to facts.

g 9. Institutional economics gives one such perspective which may be a useful guide for us here. Viewed from a functional perspective, the State, and Governments, may be seen as coming into existence in order to solve, what institutional economists have come to refer to as, the coordination problems in providing public goods, and prevent the disutility that emerges from the moral hazard of a short run utility maximiser, who may desire the benefits of

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goods and services that are to be provided in common to the public, and yet have the interest of not paying for their production.

10. Security of the nation, infrastructure of governance, including those that relate to law-making and law-keeping functions, crime prevention, detection and punishment, coordination of the economy, and ensuring minimal levels of material, and cultural goods for those who may not be in a position to fend for themselves or who have been left by the wayside by the operation of the economy and society, may all be cited as some examples of the kinds of public goods that the State is expected to provide for, or enable the provision of. Inasmuch as the market is primarily expected to cater to purely self-centred activities of individuals and groups, markets and the domain of purely private social action significantly fail to provide such goods. Consequently, the State, and Government, emerges to rectify the coordination problem, and provide the public goods.

11. Unaccounted for monies, especially large sums held by nationals and entities with a legal presence in the nation, in banks abroad, especially in tax havens or in jurisdictions with a known history of silence about sources of monies, clearly indicate a compromise of the ability of the State to manage its affairs in consonance with what is required from a constitutional perspective. This is so in two respects. The quantum of such monies by itself, along with the numbers of individuals or other legal entities who hold such monies, may indicate in the first instance that a large volume of activities, in the social and the economic spheres within the country are unlawful and causing great social damage, both at the individual and the collective levels. Secondly, large quanta of monies stashed abroad, would also indicate a substantial weakness in the capacity of the State in collection of taxes on incomes generated by individuals and other legal entities within the country. The generation of such revenues is essential for the State to undertake the various public goods and services that it is constitutionally mandated, and normatively expected by its citizenry, to provide. A substantial degree of incapacity, in the above respect, would be an indicia of the degree of failure of the State; and beyond a particular point, the State may spin into a vicious cycle of declining moral authority, thereby causing the incidence of unlawful activities in which wealth is sought to be generated, as well as instances of tax evasion, to increase in volume and in intensity.

12. Consequently, the issue of unaccounted for monies held by nationals, and other legal entities, in foreign banks, is of primordial importance to the welfare of the citizens. The quantum of such monies may be rough indicators of the weakness of the State, in terms of both crime prevention, and also of tax collection. Depending on the volume of such monies, and the number of incidents through which such monies are generated and secreted away, it may very well reveal the degree of "softness of the State".

13. The concept of a "soft State" was famously articulated by the Nobel Laureate, Gunnar Myrdal. It is a broad-based assessment of the degree to which the State, and its machinery, is equipped to deal with its responsibilities of governance. The more soft the State is, greater the

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likelihood that there is an unholy nexus between the law maker, the law keeper, and the law breaker.

- a 14. When a catch-all word like "crimes" is used, it is common for people, and the popular culture to assume that it is "petty crime", or crimes of passion committed by individuals. That would be a gross mischaracterisation of the seriousness of the issues involved. Far more dangerous are the crimes that threaten national security and national interest. For instance, with globalisation, nation-States are also confronted by the dark worlds of
- b international arms dealers, drug-peddlers and various kinds of criminal networks, including networks of terror. International criminal networks that extend support to home-grown terror or extremist groups, or those that have been nurtured and sustained in hostile countries, depend on networks of formal and informal, lawful and unlawful mechanisms of transfer of monies across boundaries of nation-States. They work in the interstices of the
- c microstructures of financial transfers across the globe, and thrive in the lacunae, the gaps in law and of effort. The loosening of control over those mechanisms of transfers, guided by an extreme neoliberal thirst to create a global market that is free of the friction of law and its enforcement, by nation-States, may have also contributed to an increase in the volume, extent and intensity of activities by criminal and terror networks across the globe.
- d 15. Increasingly, on account of "greed is good" culture that has been promoted by neoliberal ideologues, many countries face the situation where the model of capitalism that the State is compelled to institute, and the markets it spawns, is predatory in nature. From mining mafias to political operators who, all too willingly, bend policies of the State to suit particular individuals or groups in the social and economic sphere, the *raison d'être* for
- e weakening the capacities and intent to enforce the laws is the lure of the lucre. Even as the State provides violent support to those who benefit from such predatory capitalism, often violating the human rights of its citizens, particularly its poor, the market begins to function like a bureaucratic machine dominated by big business; and the State begins to function like the market, where everything is available for sale at a price.
- f 16. The paradigm of governance that has emerged, over the past three decades, prioritises the market, and its natural course, over any degree of control of it by the State. The role for the State is visualised by votaries of the neoliberal paradigm as that of a night watchman; and moreover it is also expected to take its hands out of the till of the wealth generating machinery. Based on the theories of Arthur Laffer, and pushed by the Washington
- g Consensus, the prevailing wisdom of the elite, and of the policy-makers, is that reduction of tax rates, thereby making tax regimes regressive, would incentivise the supposed genius of entrepreneurial souls of individuals, actuated by pursuit of self-interest and desire to accumulate great economic power. It was expected that this would enable the generation of more wealth, at a more rapid pace, thereby enabling the State to generate appropriate tax
- h revenues even with lowered tax rates. Further, benefits were also expected in moral terms—that the lowering of tax rates would reduce the incentives of

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wealth generators to hide their monies, thereby saving them from the guilt of tax evasion. Whether that is an appropriate model of social organisation or not, and from the perspective of constitutional adjudication, whether it meets the requirements of constitutionalism as embedded in the texts of various constitutions, is not a question that we want to enter in this matter. a

17. Nevertheless, it would be necessary to note that there is a fly in the ointment of the above story of friction-free markets that would always clear, and always work to the benefit of the society. The strength of tax collection machinery can, and ought to be, expected to have a direct bearing on the revenues collected by the State. If the machinery is weak, understaffed, ideologically motivated to look the other way, or the agents motivated by not so salubrious motives, the amount of revenue collected by the State would decline, stagnate, or may not generate the revenue for the State that is consonant with its responsibilities. From within the neoliberal paradigm, also emerged the undergirding current of thought that revenues for the State imply a big Government, and hence a strong tax collecting machinery itself would be undesirable. Where the elite lose out in democratic politics of achieving ever decreasing tax rates, it would appear that State machineries in the hands of the executive, all too willing to promote the extreme versions of the neoliberal paradigm and co-opt itself in the enterprises of the elite, may also become all too willing to not develop substantial capacities to monitor and follow the money, collect the lawfully mandated taxes, and even look the other way. The results, as may be expected, have been disastrous across many nations. b c d

18. In addition, it would also appear that in this miasmatic cultural environment in which greed is extolled, conspicuous consumption viewed as both necessary and socially valuable, and the wealthy viewed as demigods, the agents of the State may have also succumbed to the notions of the neoliberal paradigm that the role of the State ought to only be an enabling one, and not exercise significant control. This attitude would have a significant impact on exercise of discretion, especially in the context of regulating economic activities, including keeping an account of the monies generated in various activities, both legal and illegal. Carried away by the ideology of neoliberalism, it is entirely possible that the agents of the State entrusted with the task of supervising the economic and social activities may err more on the side of extreme caution, whereby signals of wrongdoing may be ignored even when they are strong. Instances of the powers that be ignoring publicly visible stock market scams, or turning a blind eye to large-scale illegal mining have become all too familiar, and may be readily cited. That such activities are allowed to continue to occur, with weak, or non-existent, responses from the State may, at best, be charitably ascribed to this broader culture of permissibility of all manner of private activities in search of ever more lucre. Ethical compromises, by the elite—those who wield the powers of the State, and those who fatten themselves in an ever more exploitative economic sphere—can be expected to thrive in an environment marked by such a permissive attitude, of weakened laws, and of weakened law enforcement machineries and attitudes. e f g h

19. To the above, we must also add the fragmentation of administration. Even as the range of economic and social activities have expanded, and their
- a sophistication increased by leaps and bounds, the response in terms of administration by the State has been to create ever more specialised agencies and departments. To some degree this has been unavoidable. Nevertheless, it would also appear that there is a need to build internal capacities to share information across such departments, lessen the informational asymmetries between, and friction to flow of information across the boundaries of
  - b departments and agencies, and reduce the levels of consequent problems in achieving coordination. Life and social action within which human life becomes possible, do not proceed on the basis of specialised fiefdoms of expertise. They cut across the boundaries erected as a consequence of an inherent tendency of experts to specialise. The result, often, is a system-wide blindness, while yet being lured by the dazzle of ever greater specialisation.
  - c Many dots of information, now collected in ever-increasing volume by development of sophisticated information technologies, get ignored on account of lack of coordination across agencies, and departments, and tendency within bureaucracy to jealously guard their own turfs. In some instances, the failure to properly investigate or to prevent unlawful activities
  - d could be the result of such overspecialisation, frictions in sharing of information, and coordination across departmental and specialised agency boundaries.

20. If the State is soft to a large extent, especially in terms of the unholy nexus between the law makers, the law keepers, and the law breakers, the moral authority, and also the moral incentives, to exercise suitable control
- e over the economy and the society would vanish. Large unaccounted for monies are generally an indication of that.

21. In a recent book, Prof. Rothberg states, after evaluating many failed and collapsed States over the past few decades:

- “... Failed States offer unparalleled economic opportunity—but only for a privileged few. Those around the ruler or the ruling oligarchy grow richer while their less fortunate brethren starve. Immense profits are
- f available from an awareness of regulatory advantages and currency speculation and arbitrage. But the privilege of making real money when everything else is deteriorating is confined to clients of the ruling elite ... The nation-State’s responsibility to maximise the well-being and personal prosperity of all of its citizens is conspicuously absent, if it ever existed. Corruption flourishes in many States, but in failed States it often
  - g does so on an unusually destructive scale. There is widespread petty or lubricating corruption as a matter of course, but escalating levels of venal corruption mark failed States.”<sup>1</sup>

22. India finds itself in a peculiar situation. Often celebrated, in popular
- h culture, as an emerging economy that is rapidly growing, and expected to be

<sup>1</sup> “The Failure and Collapse of Nation-States—Breakdown, Prevention and Repair” in Rothberg, Robert I. (Ed.), *When States Fail: Causes and Consequences* (Princeton University Press 2001).



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a future economic and political giant on the global stage, it is also popularly perceived, and apparently even in some responsible and scholarly circles, and official quarters, that some of its nationals and other legal entities have stashed the largest quantum of unaccounted for monies in foreign banks, especially in tax havens, and in other jurisdictions with strong laws of secrecy. There are also apparently reports and analyses, generated by the Government of India itself, which place the amounts of such unaccounted for monies at astronomical levels.

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23. We do not wish to engage in any speculation as to what such analyses, reports and factuality imply with respect to the state of the nation. The citizens of our country can make, and ought to be making, rational assessments of the situation. We fervently hope that it leads to responsible, reasoned and reasonable debate, thereby exerting the appropriate democratic pressure on the State and its agents, within the constitutional framework, to bring about the necessary changes without sacrificing cherished and inherently invaluable social goals and values enshrined in the Constitution. c

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24. The failures are discernible when viewed against the vision of the constitutional project, and as forewarned by Dr. Ambedkar, have been on account of the fact that man has been vile, and not the defects of a Constitution forged in the fires of wisdom gathered over cons of human experience. If the politico-bureaucratic, power wielding, and business classes bear a large part of the blame, at least some part of blame ought to be apportioned to those portions of the citizenry that is well informed, or is expected to be informed. Much of that citizenry has disengaged itself with the political process, and with the masses. Informed by contempt for the poor and the downtrodden, the elite classes that have benefited the most, or expects to benefit substantially from the neoliberal policies that would wish away the hordes, has also chosen to forget that constitutional mandate is as much the responsibility of the citizenry, and through their constant vigilance, of all the organs of the State, and national institutions including political parties. To not be engaged in the process, is to ensure the evisceration of constitutional content. Knee-jerk reactions, and ill-advised tinkering with the constitutional framework are not the solutions. The road is always long, and needs the constant march of the citizenry on it. There is no other way. To expect instant solutions, because this law or that body is formed, without striving to solve system-wide, and systemic problems that have emerged is to not understand the demands of a responsible citizenry in modern constitutional republican democracies. e f

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25. These matters before us relate to issues of large sums of unaccounted for monies, allegedly held by certain named individuals, and loose associations of them; consequently we have to express our serious concerns from a constitutional perspective. The amount of unaccounted for monies, as alleged by the Government of India itself is massive. The show-cause notices were issued a substantial length of time ago. The named individuals were very much present in the country. Yet, for unknown, and possibly unknowable, though easily surmisable, reasons the investigations into the h

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a matter proceeded at a laggardly pace. Even the named individuals had not yet been questioned with any degree of seriousness. These are serious lapses, especially when viewed from the perspective of larger issues of security, both internal and external, of the country.

26. It is in light of the above, that we heard some significant elements of the instant writ petitions filed in this Court, and at this stage it is necessary that appropriate orders be issued. There are two issues we deal with below:

- b (i) the appointment of a Special Investigation Team; and
- (ii) disclosure, to the petitioners, of certain documents relied upon by the Union of India in its response.

PART II

c 27. The instant writ petition was filed in 2009 by Shri Ram Jethmalani, Shri Gopal Sharman, Smt Jalbala Vaidya, Shri K.P.S. Gill, Prof. B.B. Dutta and Shri Subhash Kashyap, all well-known professionals, social activists, former bureaucrats or those who have held responsible positions in the society. They have also formed an organisation called Citizen India, the stated objective of which is said to be to bring about changes and betterment in the quality of governance and functioning of all public institutions.

d 28. The petitioners state that there have been a slew of reports, in the media, and also in scholarly publications that various individuals, mostly citizens, but may also include non-citizens, and other entities with presence in India, have generated, and secreted away large sums of monies, through their activities in India or relating to India, in various foreign banks, especially in tax havens, and jurisdictions that have strong secrecy laws with respect to the contents of bank accounts and the identities of individuals e holding such accounts. The petitioners allege that most of such monies are unaccounted for, and in all probability have been generated through unlawful activities, whether in India or outside India, but relating to India. Further, the petitioners also allege that a large part of such monies may have been generated within India, and have been taken away from India, breaking various laws, including but not limited to evasion of taxes.

f 29. The petitioners contend:

- g (i) that the sheer volume of such monies points to grave weaknesses in the governance of the nation, because they indicate a significant lack of control over unlawful activities through which such monies are generated, evasion of taxes, and use of unlawful means of transfer of funds;
- (ii) that these funds are then laundered and brought back into India, to be used in both legal and illegal activities;
- (iii) that the use of various unlawful modes of transfer of funds across borders, gives support to such unlawful networks of international finance; and
- h (iv) that inasmuch as such unlawful networks are widely acknowledged to also effectuate transfer of funds across borders in aid of

various crimes committed against persons and the State, including but not limited to activities that may be classifiable as terrorist, extremist or unlawful narcotic trade, the prevailing situation also has very serious connotations for the security and integrity of India. a

30. The petitioners also further contend that a significant part of such large unaccounted for monies include the monies of powerful persons in India, including leaders of many political parties. It was also contended that the Government of India, and its agencies, have been very lax in terms of keeping an eye on the various unlawful activities generating unaccounted for monies, the consequent tax evasion; and that such laxity extends to efforts to curtail the flow of such funds out of, and into, India. Further, the petitioners also contend that the efforts to prosecute the individuals, and other entities, who have secreted such monies in foreign banks, have been weak or non-existent. It was strongly argued that the efforts at identification of such monies in various bank accounts in many jurisdictions across the globe, attempts to bring back such monies, and efforts to strengthen the governance framework to prevent further outflows of such funds, have been sorely lacking. b c

31. The petitioners also made allegations about certain specific incidents and patterns of dereliction of duty, wherein the Government of India, and its various agencies, even though in possession of specific knowledge about the monies in certain bank accounts, and having estimated that such monies run into many scores of thousands of crores, and upon issuance of show-cause notices to the said individual, surprisingly have not proceeded to initiate and carry out suitable investigations, and prosecute the individuals. The individual specifically named is one Hassan Ali Khan. The petitioners also contended that Kashinath Tapuria and his wife Chandrika Tapuria, are also party to the illegal activities of Hassan Ali Khan. d e

32. Specifically, it was alleged that Hassan Ali Khan was served with an income tax demand for Rs 40,000 crores (Rupees forty thousand crores), and that the Tapurias were served an income tax demand notice of Rs 20,580 crores (Rupees twenty thousand and five hundred and eighty crores). The Enforcement Directorate, in 2007, disclosed that Hassan Ali Khan had "dealings amounting to 1.6 billion US dollars" in the period 2001-2005. In January 2007, upon raiding Hassan Ali's residence in Pune, certain documents and evidence had been discovered regarding deposits of 8.04 billion dollars with UBS Bank in Zurich. f

33. It is the contention of the petitioners that, even though such evidence was secured nearly four-and-half years ago, g

(i) a proper investigation had not been launched to obtain the right facts from abroad;

(ii) the individuals concerned, though present in India, and subject to its jurisdiction, and easily available for its exercise, had not even been interrogated appropriately; h

a (iii) that the Union of India, and its various departments, had even been refusing to divulge the details and information that would reveal the actual status of the investigation, whether in fact it was being conducted at all, or with any degree of seriousness;

b (iv) given the magnitude of amounts in question, especially of the demand notice of income tax, the laxity of investigation indicates multiple problems of serious non-governance, and weaknesses in the system, including pressure from political quarters to hinder, or scuttle, the investigation, prosecution, and ultimately securing the return of such monies; and

c (v) given the broadly accepted fact that within the political class corruption is rampant, ill-begotten wealth has begun to be amassed in massive quantities by many members in that class, it may be reasonable to suspect, or even conclude, that investigation was being deliberately hindered because Hassan Ali Khan, and the Tapurias, had or were continuing to handle the monies of such a class. The fact that both Income Tax Department and the Enforcement Directorate routinely, and with alacrity, seek the powers for long stretches of custodial interrogation of even those suspected of having engaged in money laundering, or evaded taxes, with respect to very small amounts, ought to raise the reasonable suspicion that inaction in the matters concerning Hassan Ali Khan, and Tapurias, was deliberately engineered, for nefarious reasons.

d 34. In addition, the petitioners also state that inasmuch as the bank in which the monies had been stashed by Hassan Ali Khan was UBS Zurich, the needle of suspicion has to inexorably turn to high-level political interference and hindrance to the investigations. The said bank, it was submitted, is the biggest or one of the biggest wealth management companies in the world. The petitioners also narrated the mode, and the manner, in which the United States had dealt with UBS, with respect to monies of American citizens secreted away with the said bank. It was also alleged that UBS had not cooperated with the US authorities. Contrasting the relative alacrity, and vigour, with which the United States Government had pursued the matters, e the petitioners contend that the inaction of the Union of India is shocking.

f 35. The petitioners further allege that in 2007, Reserve Bank of India had obtained some "knowledge of the dubious character" of UBS Security India Private Limited, a branch of UBS, and consequently stopped this Bank from extending its business in India by refusing to approve its takeover of Standard Chartered Mutual Funds business in India. It was also claimed by the g petitioners that SEBI had alleged that UBS played a role in the stock market crash of 2004. The said UBS Bank has apparently applied for a retail banking licence in India, which was approved in principle by RBI initially. In 2008, this licence was withheld on the ground that "investigation of its unsavoury role in Hassan Ali Khan's case was pending investigation in the Enforcement Directorate". However, it seems that RBI reversed its decision in 2009, and h no good reasons seem to be forthcoming for the reversal of the decision of

2008. The petitioners contend that such a reversal of decision could only have been accomplished through high level intervention, and that it is further evidence of linkages between members of the political class, and possibly even members of the bureaucracy, and such banking operations, and the illegal activities of Hassan Ali Khan and the Tapurias. Hence, the petitioners argued, in the circumstances it would have to be necessarily concluded that the investigations into the affairs of Hassan Ali Khan and the Tapurias, would be severely compromised if the Court does not intervene, and monitor the investigative processes by appointing a Special Investigation Team reporting directly to the Court. a b

36. The learned Senior Counsel for the petitioners sought that this Court intervene, order proper investigations, and monitor continuously the actions of the Union of India, and any and all governmental departments and agencies, in these matters. It was submitted that their filing of this writ petition under Article 32 is proper, as the inaction of the Union of India, as described above, violates the fundamental rights—to proper governance, inasmuch as Article 14 provides for equality before the law and equal protection of the law, and Article 21 promises dignity of life to all citizens. c

37. We have heard the learned Senior Counsel for the petitioners, Shri Anil B. Divan, the learned Senior Counsel for the interveners, Shri K.K. Venugopal, and the learned Senior Counsel for the petitioners in the connected writ petition, Shri Shanti Bhushan. We have also heard the learned Solicitor General, Shri Gopal Subramaniam, on behalf of the respondents. d

38. Shri Divan, specifically argued that having regard to the nature of the investigation, its slow pace so far, and the non-seriousness on the part of the respondents, there is a need to constitute a Special Investigation Team (SIT) headed by a former Judge or two of this Court. However, this particular plea has been vociferously resisted by the Solicitor General. Relying on the status reports submitted from time to time, the learned Solicitor General stated that all possible steps were being taken to bring back the monies stashed in foreign banks, and that the investigations in cases registered were proceeding in an appropriate manner. He expressed his willingness for a Court-monitored investigation. He also further submitted that the respondents, in principle, have no objections whatsoever against the main submissions of the petitioners. e f

39. The real point of controversy is, given above, as to whether there is a need to constitute an SIT to be headed by a Judge or two, of this Court, to supervise the investigation. g

40. We must express our serious reservations about the responses of the Union of India. In the first instance, during the earlier phases of hearing before us, the attempts were clearly evasive, confused, or originating in the denial mode. It was only upon being repeatedly pressed by us did the Union of India begin to admit that indeed the investigation was proceeding very slowly. It also became clear to us that in fact the investigation had completely stalled, inasmuch as custodial interrogation of Hassan Ali Khan had not even h

a been sought for, even though he was very much resident in India. Further, it also now appears that even though his passport had been impounded, he was able to secure another passport from the RPO in Patna, possibly with the help or aid of a politician.

b 41. During the course of the hearings the Union of India repeatedly insisted that the matter involves many jurisdictions, across the globe, and a proper investigation could be accomplished only through the concerted efforts by different law enforcement agencies, both within the Central Government, and also, various State Governments. However, the absence of any satisfactory explanation of the slowness of the pace of investigation, and lack of any credible answers as to why the respondents did not act with respect to those actions that were feasible, and within the ambit of powers of the Enforcement Directorate itself, such as custodial investigation, leads us to conclude that the lack of seriousness in the efforts of the respondents are contrary to the requirements of laws and constitutional obligations of the Union of India. It was only upon the insistence and intervention of this Court that the Enforcement Directorate initiated and secured custodial interrogation over Hassan Ali Khan.

d 42. The Union of India has explicitly acknowledged that there was much to be desired with the manner in which the investigation had proceeded prior to the intervention of this Court. From the more recent reports, it would appear that the Union of India, on account of its more recent efforts to conduct the investigation with seriousness, on account of the gravitas brought by this Court, has led to the securing of additional information, and leads, which could aid in further investigation. For instance, during the continuing interrogation of Hassan Ali Khan and the Tapurias, undertaken for the first time at the behest of this Court, many names of important persons, including e leaders of some corporate giants, politically powerful people, and international arms dealers have cropped up. So far, no significant attempt has been made to investigate and verify the same. This is a further cause for the grave concerns of this Court, and points to the need for continued, effective and day-to-day monitoring by an SIT constituted by this Court, and acting on behalf, behest and direction of this Court.

g 43. In light of the fact that the issues are complex, requiring expertise and knowledge of different departments, and the necessity of coordination of efforts across various agencies and departments, it was submitted to us that the Union of India has recently formed a High-Level Committee, under the aegis of the Department of Revenue in the Ministry of Finance, which is the nodal agency responsible for all economic offences. The composition of the High-Level Committee (HLC) is said to be as follows: (i) Secretary, Department of Revenue, as the Chairman; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBDT; (vii) DG, Narcotics Control Bureau; (viii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FI & TR-I), CBDT. It was also submitted that the HLC may co-opt, as h necessary, representation not below the rank of Joint Secretary from the

Home Secretary, Foreign Secretary, Defence Secretary and the Secretary, Cabinet Secretariat. The Union of India claims that such a multi-disciplinary group and committee would now enable the conducting of an efficient and a systematic investigation into the matters concerning allegations against Hassan Ali Khan and the Tapurias; and further that such a committee would also enable the taking of appropriate steps to bring back the monies stashed in foreign banks, for which purposes a need may arise to register further cases. The Union of India also claims that the formation of such a committee indicates the seriousness with which it is viewing the entire matter.

44. While it would appear, from the status reports submitted to this Court, that the Enforcement Directorate has moved in some small measure, the actual facts are not comforting to an appropriate extent. In fact we are not convinced that the situation has changed to the extent that it ought to, so as to accept that the investigation would now be conducted with the degree of seriousness that is warranted. According to the Union of India the HLC was formed in order to take charge of and direct the entire investigation, and subsequently, the prosecution. In the meanwhile a charge-sheet has been filed against Hassan Ali Khan. Upon inquiry by us as to whether the charge-sheet had been vetted by the HLC, and its inputs secured, the counsel for the Union of India were flummoxed. The fact was that the charge-sheet had not been given even for the perusal of the HLC, let alone securing its inputs, guidance and direction. We are not satisfied by the explanation offered by the Directorate of Enforcement by way of affidavit after the orders were reserved. Be it noted that a nodal agency was set up, pursuant to the directions of this Court in *Vineet Narain case*<sup>2</sup> given many years ago. Yet the same was not involved and these matters were never placed before it. Why?

45. From the status reports, it is clear that the problem is extremely complex, and many agencies and departments spread across the country have not responded with the alacrity, and urgency, that one would desire. Moreover, the Union of India has been unable to answer any of the questions regarding its past actions, and their implications, such as the slowness of the investigation, or about grant of licence to conduct retail banking by UBS, by reversing the decision taken earlier to withhold such a licence on the grounds that the said Bank's credentials were suspect. To this latter query, the stance of the Union of India has been that entry of UBS would facilitate flow of foreign investments into India.

46. The question that arises is: whether the task of bringing foreign funds into India override all other constitutional concerns and obligations?

47. The predominant theme in the responses of the Union of India before this Court has been that it is doing all that it can to bring back the unaccounted for monies stashed in various banks abroad. To this is added the qualifier that it is an extremely complex problem, requiring the cooperation of many different jurisdictions, and an internationally coordinated effort. Indeed they are complex. We do not wish to go into the details of arguments

<sup>2</sup> *Vineet Narain v. Union of India*, (1996) 2 SCC 199 : 1996 SCC (Cr) 264

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about whether the Union of India is, or is not, doing necessary things to achieve such goals. That is not necessary for the matters at hand.

- a 48. What is important is that the Union of India had obtained knowledge, documents and information that indicated possible connections between Hassan Ali Khan, and his alleged co-conspirators and known international arms dealers. Further, the Union of India was also in possession of information that suggested that because the international arms dealing network, and a very prominent dealer in it, could not open a bank account even in a jurisdiction that is generally acknowledged to lay great emphasis on not asking sources of money being deposited into its banks, Hassan Ali Khan may have played a crucial role in opening an account with the branch of the same bank in another jurisdiction. The volume of alleged income taxes owed to the country, as demanded by the Union of India itself, and the volume of monies, by some accounts US \$8.04 billion, and some other accounts in excess of Rs 70,000 crores, that are said to have been routed through various bank accounts of Hassan Ali Khan and Tapurias. Further, from all accounts it has been acknowledged that none of the named individuals have any known and lawful sources for such huge quantities of monies.

- d 49. All of these factors, either individually or combined, ought to have immediately raised questions regarding the sources being unlawful activities, national security, and transfer of funds into India for other illegal activities, including acts against the State. It was only at the repeated insistence by us that such matters have equal, if not even greater importance than issues of tax collection, has the Union of India belatedly concluded that such aspects also ought to be investigated with thoroughness. However, there is still no evidence of a really serious investigation into these other matters from the national security perspective.

- f 50. The fact remains that the Union of India has struggled in conducting a proper investigation into the affairs of Hassan Ali Khan and the Tapurias. While some individuals, whose names have come to the adverse knowledge of the Union of India, through the more recent investigations, have been interrogated, many more are yet to be investigated. This highly complex investigation has in fact just begun. It is still too early to conclude that the Union of India has indeed placed all the necessary machinery to conduct a proper investigation. The formation of the HLC was a necessary step, and may even be characterised as a welcome step. Nevertheless, it is an insufficient step.

- g 51. In light of the above, we had proposed to the Union of India that the same HLC constituted by it be converted into a Special Investigation Team, headed by two retired Judges of the Supreme Court of India. The Union of India opposes the same, but provides no principle as to why that would be undesirable, especially in light of the many lapses and lacunae in its actions in these matters spread over the past four years.

- h 52. We are of the firm opinion that in these matters fragmentation of the Government, and expertise and knowledge, across many departments, agencies and across various jurisdictions, both within the country, and across



the globe, is a serious impediment to the conduct of a proper investigation. We hold that it is in fact necessary to create a body that coordinates, directs, and where necessary orders timely and urgent action by various institutions of the State. We also hold that the continued involvement of this Court in these matters, in a broad oversight capacity, is necessary for upholding the rule of law, and achievement of constitutional values. However, it would be impossible for this Court to be involved in day-to-day investigations, or to constantly monitor each and every aspect of the investigation. a

53. The resources of this Court are scarce, and it is overburdened with the task of rendering justice in well over a lakh of cases every year. Nevertheless, this Court is bound to uphold the Constitution, and its own burdens, excessive as they already are, cannot become an excuse for it to not perform that task. In a country where most of its people are uneducated and illiterate, suffering from hunger and squalor, the retraction of the monitoring of these matters by this Court would be unconscionable. b

54. The issue is not merely whether the Union of India is making the necessary effort to bring back all or some significant part of the alleged monies. The fact that there is some information and knowledge that such vast amounts may have been stashed away in foreign banks, implies that the State has the primordial responsibility, under the Constitution, to make every effort to trace the sources of such monies, punish the guilty where such monies have been generated and/or taken abroad through unlawful activities, and bring back the monies owed to the country. We do recognise that the degree of success, measured in terms of the amounts of monies brought back, is dependent on a number of factors, including aspects that relate to international political economy and relations, which may or may not be under our control. The fact remains that with respect to those factors that were within the powers of the Union of India, such as investigation of possible criminal nexus, threats to national security, etc., were not even attempted. Fealty to the Constitution is not a matter of mere material success; but, and probably more importantly from the perspective of the moral authority of the State, a matter of integrity of effort on all the dimensions that inform a problem that threatens the constitutional projects. Further, the degree of seriousness with which efforts are made with respect to those various dimensions can also be expected to bear fruit in terms of building capacities, and the development of necessary attitudes to take the law enforcement part of accounting or following the money seriously in the future. c d e f

55. The merits of vigour of investigations, and attempts at law enforcement, cannot be measured merely on the scale of what we accomplish with respect to what has happened in the past. It would necessarily also have to be appreciated from the benefits that are likely to accrue to the country in preventing such activities in the future. Our people may be poor, and may be suffering from all manner of deprivation. However, the same poor and suffering masses are rich, morally and from a humanistic point of view. Their forbearance of the many foibles and failures of those who wield power, no less in their name and behalf than of the rich and the empowered, is itself g h

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a indicative of their great qualities, of humanity, trust and tolerance. That greatness can only be matched by exercise of every sinew, and every resource, in the broad goal of our constitutional project of bringing to their lives dignity. The efforts that this Court makes in this regard, and will make in this respect and these matters, can only be conceived as a small and minor, though nevertheless necessary, part. Ultimately the protection of the Constitution and striving to promote its vision and values is an elemental mode of service to our people.

b 56. We note that in many instances, in the past, when issues referred to the Court have been very complex in nature, and yet required the intervention of the Court, Special Investigation Teams have been ordered and constituted in order to enable the Court, and the Union of India and/or other organs of the State, to fulfil their constitutional obligations. The following instances may be noted: *Vineet Narain v. Union of India*<sup>2</sup>, *NHRC v. State of Gujarat*<sup>3</sup>,  
c *Sanjiv Kumar v. State of Haryana*<sup>4</sup> and *Centre for Public Interest Litigation v. Union of India*<sup>5</sup>.

57. In light of the above we herewith order:

(i) That the High-Level Committee constituted by the Union of India, comprising of (i) Secretary, Department of Revenue; (ii) Deputy Governor, Reserve Bank of India; (iii) Director (IB); (iv) Director, Enforcement; (v) Director, CBI; (vi) Chairman, CBI; (vii) DG, Narcotics Control Bureau; (viii) DG, Revenue Intelligence; (ix) Director, Financial Intelligence Unit; and (x) JS (FT & TR-I), CBI be forthwith appointed with immediate effect as a Special Investigation Team;

(ii) That the Special Investigation Team, so constituted, also include Director, Research and Analysis Wing;

(iii) That the above Special Investigation Team, so constituted, be headed by and include the following former eminent Judges of this Court: (a) Hon'ble Mr Justice B.P. Jeevan Reddy as Chairman; and (b) Hon'ble Mr Justice M.B. Shah as Vice-Chairman; and that the Special Investigation Team function under their guidance and direction;

(iv) That the Special Investigation Team, so constituted, shall be charged with the responsibilities and duties of investigation, initiation of proceedings, and prosecution, whether in the context of appropriate criminal or civil proceedings of:

(a) all issues relating to the matters concerning and arising from unaccounted for monies of Hassan Ali Khan and the Tapurias;

(b) all other investigations already commenced and are pending, or awaiting to be initiated, with respect to any other known instances

2 (1996) 2 SCC 199 : 1996 SCC (Cri) 264

3 (2004) 8 SCC 610

4 (2005) 5 SCC 517

5 (2011) 1 SCC 560 : (2011) 1 SCC (Cri) 463

of the stashing of unaccounted for monies in foreign bank accounts by Indians or other entities operating in India; and

(c) all other matters with respect to unaccounted for monies being stashed in foreign banks by Indians or other entities operating in India that may arise in the course of such investigations and proceedings. a

It is clarified here that within the ambit of responsibilities described above, also lie the responsibilities to ensure that the matters are also investigated, proceedings initiated and prosecutions conducted with regard to criminality and/or unlawfulness of activities that may have been the source for such monies, as well as the criminal and/or unlawful means that are used to take such unaccounted for monies out of and/or bring such monies back into the country, and use of such monies in India or abroad. The Special Investigation Team shall also be charged with the responsibility of preparing a comprehensive action plan, including the creation of necessary institutional structures that can enable and strengthen the country's battle against generation of unaccounted for monies, and their stashing away in foreign banks or in various forms domestically. b

(v) That the Special Investigation Team so constituted report and be responsible to this Court, and that it shall be charged with the duty to keep this Court informed of all major developments by the filing of periodic status reports, and following of any special orders that this Court may issue from time to time; c

(vi) That all organs, agencies, departments and agents of the State, whether at the level of the Union of India, or the State Government, including but not limited to all statutorily formed individual bodies, and other constitutional bodies, extend all the cooperation necessary for the Special Investigation Team so constituted and functioning; d

(vii) That the Union of India, and where needed even the State Governments, are directed to facilitate the conduct of the investigations, in their fullest measure, by the Special Investigation Team so constituted and functioning, by extending all the necessary financial, material, legal, diplomatic and intelligence resources, whether such investigations or portions of such investigations occur inside the country or abroad; e

(viii) That the Special Investigation Team also be empowered to further investigate even where charge-sheets have been previously filed; and that the Special Investigation Team may register further cases, and conduct appropriate investigations and initiate proceedings, for the purpose of bringing back unaccounted for monies unlawfully kept in bank accounts abroad. f

58. We accordingly direct the Union of India to issue appropriate notification and publish the same forthwith. It is needless to clarify that the former Judges of this Court so appointed to supervise the Special Investigation Team are entitled to their remuneration, allowances, perks, g

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- a facilities as that of the Judges of the Supreme Court. The Ministry of Finance, Union of India, shall be responsible for creating the appropriate infrastructure and other facilities for proper and effective functioning of the Special Investigation Team at once.

### PART III

- b 59. We now turn our attention to the matter of disclosure of various documents referenced by the Union of India, as sought by the petitioners. These documents, including names and bank particulars, relate to various bank accounts of Indian citizens, in the Principality of Liechtenstein (Liechtenstein), a small landlocked sovereign nation-State in Europe. It is generally acknowledged that Liechtenstein is a tax haven.

- c 60. Apparently, as alleged by the petitioners, a former employee of a bank or banks in Liechtenstein secured the names of some 1400 bank account-holders, along with the particulars of such accounts, and offered the information to various entities. The same was secured by the Federal Republic of Germany (Germany), which in turn, apart from initiating tax proceedings against some 600 individuals, also offered the information regarding nationals and citizens of other countries to such countries. It is the contention of the petitioners that even though the Union of India was informed about the presence of the names of a large number of Indian citizens in the list of names revealed by the former bank employee, the Union of India never made a serious attempt to secure such information and proceed to investigate such individuals.

- e 61. It is the contention of the petitioners that such names include the identities of prominent and powerful Indians, or the identities of individuals, who may or may not be Indian citizens, but who could lead to information about various powerful Indians holding unaccounted for monies in bank accounts abroad. It is also the contention of the petitioners that, even though they had sought the information under the Right to Information Act, 2005, the respondents had not revealed the names nor divulged the relevant documents. The petitioners argue that such a reluctance is only on account of the Union of India not having initiated suitable steps to recover such monies, and punish the named individuals, and also because revelation of names of individuals on the list would lead to discovery of powerful persons engaged in various unlawful activities, both in generation of unlawful and unaccounted for monies, and their stashing away in banks abroad.

- g 62. It was also alleged by the petitioners that in fact Germany had offered such information, freely and generally to any country that requests the same, and did not specify that the names and other information pertaining to such names ought to be requested only pursuant to any double taxation agreements it has with other countries. The petitioners also alleged that the Union of India has chosen to proceed under the assumption that it could have requested such information only pursuant to the double taxation agreement it has with Germany. The petitioners contend that the Government of India took such a step primarily to conceal the information from public gaze.

63. The response of the Union of India may be summed up briefly:

(i) that they secured the names of individuals with bank accounts in banks in Liechtenstein, and other details with respect to such bank accounts, pursuant to an agreement of India with Germany for avoidance of double taxation and prevention of fiscal evasion; a

(ii) that the said agreement proscribes the Union of India from disclosing such names, and other documents and information with respect to such bank accounts, to the petitioners, even in the context of these ongoing proceedings before this Court; b

(iii) that the disclosure of such names, and other documents and information, secured from Germany, would jeopardise the relations of India with a foreign State;

(iv) that the disclosure of such names, and other documents and information, would violate the right to privacy of those individuals who may have only deposited monies in a lawful manner; c

(v) that disclosure of names, and other documents and information can be made with respect to those individuals with regard to whom investigations are completed, and proceedings initiated; and

(vi) that contrary to assertions by the petitioners, it was Germany which had asked the Union of India to seek the information under double taxation agreement, and that this was in response to an earlier request by the Union of India for the said information. d

64. For the purposes of the instant order, the issue of whether the Union of India could have sought and secured the names, and other documents and information, without having to take recourse to the double taxation agreement is not relevant. For the purposes of determining whether the Union of India is obligated to disclose the information that it obtained, from Germany, with respect to accounts of Indian citizens in a bank in the Principality of Liechtenstein, we need only examine the claims of the Union of India as to whether it is proscribed by the double taxation agreement with Germany from disclosing such information. Further, and most importantly, we would also have to examine whether in the context of Article 32 proceedings before this Court, wherein this Court has exercised jurisdiction, the Union of India can claim exemption from providing such information to the petitioners, and also with respect to issues of right to privacy of individuals who hold such accounts, and with respect of whom no investigations have yet been commenced, or only partially conducted, so that the State has not yet issued a show-cause and initiated proceedings. e  
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65. We have perused the said agreement with Germany. We are convinced that the said agreement, by itself, does not proscribe the disclosure of the relevant documents and details of the same, including the names of various bank account-holders in Liechtenstein. In the first instance, we note that the names of the individuals are with respect to bank accounts in Liechtenstein, which though populated by largely German speaking people, is an independent and sovereign nation-State. The agreement between h

Germany and India is with regard to various issues that crop up with respect to German and Indian citizens' liability to pay taxes to Germany and/or India.

- a It does not even remotely touch upon information regarding Indian citizens' bank accounts in Liechtenstein that Germany secures and shares that have no bearing upon the matters that are covered by the double taxation agreement between the two countries.

66. In fact, the "information" that is referred to in Article 26 is that which is "necessary for carrying out the purposes of this agreement" i.e. the Indo-

- b German DTAA. Therefore, the information sought does not fall within the ambit of this provision. It is disingenuous for the Union of India, under these circumstances, to repeatedly claim that it is unable to reveal the documents and names as sought by the petitioners on the ground that the same is proscribed by the said agreement. It does not matter that Germany itself may have asked India to treat the information shared as being subject to the
- c confidentiality and secrecy clause of the double taxation agreement. It is for the Union of India, and the courts, in appropriate proceedings, to determine whether such information concerns matters that are covered by the double taxation agreement or not. In any event, we also proceed to examine the provisions of the double taxation agreement below, to also examine whether they proscribe the disclosure of such names, and other documents and
- d information, even in the context of these instant proceedings.

67. Relevant portions of Article 26 of the double taxation agreement with Germany, a copy of which was submitted by the Union of India, reads as follows:

- e "26. *Exchange of information.*—(1) The competent authorities of the contracting States shall exchange such information as is necessary for carrying out the purposes of this agreement. Any information received by a contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this
- f agreement. They may disclose the information in public court proceedings or in judicial proceedings.

(2) In no case shall the provisions of Para 1 be construed so as to impose on a contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other contracting State;
- g (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (order public)."

- h The above clause in the relevant agreement with Germany would indicate that, contrary to the assertions of the Union of India, there is no absolute bar

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of secrecy. Instead the agreement specifically provides that the information may be disclosed in public court proceedings, which the instant proceedings are. The proceedings in this matter before this Court, relate both to the issue of tax collection with respect to unaccounted for monies deposited into foreign bank accounts, as well as with issues relating to the manner in which such monies were generated, which may include activities that are criminal in nature also. Comity of nations cannot be predicated upon clauses of secrecy that could hinder constitutional proceedings such as these, or criminal proceedings.

68. The claim of the Union of India is that the phrase "public court proceedings", in the last sentence in Article 26(1) of the double taxation agreement only relates to proceedings relating to tax matters. The Union of India claims that such an understanding comports with how it is understood internationally. In this regard the Union of India cites a few treaties. However, the Union of India did not provide any evidence that Germany specifically requested it to not reveal the details with respect to accounts in Liechtenstein even in the context of proceedings before this Court.

69. Article 31, "General Rule of Interpretation", of the Vienna Convention on the Law of Treaties, 1969 provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". While India is not a party to the Vienna Convention, it contains many principles of customary international law, and the principle of interpretation, of Article 31 of the Vienna Convention, provides a broad guideline as to what could be an appropriate manner of interpreting a treaty in the Indian context also.

70. This Court in *Union of India v. Azadi Bachao Andolan*<sup>6</sup> approvingly noted Francis Bennion's observations that a treaty is really an indirect enactment, instead of a substantive legislation, and that drafting of treaties is notoriously sloppy, whereby inconveniences obtain. In this regard this Court further noted the dictum of Lord Widgery, C.J. that the words "are to be given their general meaning, general to lawyer and layman alike.... The meaning of the diplomat rather than the lawyer." The broad principle of interpretation, with respect to treaties, and the provisions therein, would be that ordinary meanings of words be given effect to, unless the context requires or otherwise. However, the fact that such treaties are drafted by diplomats, and not lawyers, leading to sloppiness in drafting also implies that care has to be taken to not render any word, phrase, or sentence redundant, especially where rendering of such word, phrase or sentence redundant would lead to a manifestly absurd situation, particularly from a constitutional perspective. The Government cannot bind India in a manner that derogates from constitutional provisions, values and imperatives.

71. The last sentence of Article 26(1) of the Double Taxation Avoidance Agreement with Germany, "[T]hey may disclose this information in public court

- proceedings or in judicial decisions", is revelatory in this regard. It stands out as an additional aspect or provision, and an exception, to the preceding portion of the said article. It is located after the specification that information shared between contracting parties may be revealed only to "persons or authorities (including courts and administrative bodies) involved in the assessment or collection of the enforcement or prosecution in respect of, or the determination of appeals in relation to taxes covered by this agreement". Consequently, it has to be understood that the phrase "public court proceedings" specified in the last sentence in Article 26(1) of the double taxation agreement with Germany refers to court proceedings other than those in connection with tax assessment, enforcement, prosecution, etc., with respect to tax matters. If it were otherwise, as argued by the Union of India, then there would have been no need to have that last sentence in Article 26(1) of the double taxation agreement at all. The last sentence would become redundant if the interpretation pressed by the Union of India is accepted. Thus, notwithstanding the alleged convention of interpreting the last sentence only as referring to proceedings in tax matters, the rubric of common law jurisprudence, and fealty to its principles, leads us inexorably to the conclusion that the language in this specific treaty, and under these circumstances cannot be interpreted in the manner sought by the Union of India.

72. While we agree that the language could have been tighter, and may be deemed to be sloppy, to use Francis Bennion's characterisation, negotiation of such treaties are conducted and secured at very high levels of Government, with awareness of general principles of interpretation used in various jurisdictions. It is fairly well known, at least in common law jurisdictions, that legal instruments and statutes are interpreted in a manner whereby redundancy of expressions and phrases is sought to be avoided. Germany would have been well aware of it.

73. The redundancy that would have to be ascribed to the said last sentence of Article 26(1) of the double taxation agreement with Germany, if the position of the Union of India were to be accepted, also leads to a manifest absurdity, in the context of the Indian Constitution. Such a redundancy would mean that constitutional imperatives themselves are to be set aside. Modern constitutionalism, to which Germany is a major contributor too, especially in terms of the basic structure doctrine, specifies that powers vested in any organ of the State have to be exercised within the four corners of the Constitution, and further that organs created by a Constitution cannot change the identity of the Constitution itself.

74. The basic structure of the Constitution cannot be amended even by the amending power of the legislature. Our Constitution guarantees the right, pursuant to clause (1) of Article 32, to petition this Court on the ground that the rights guaranteed under Part III of the Constitution have been violated. This provision is a part of the basic structure of the Constitution. Clause (2) of Article 32 empowers this Court to issue "directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo



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warranto and certiorari, whichever may be appropriate for the enforcement of any of the rights conferred by" Part III. This is also a part of the basic structure of the Constitution.

75. In order that the right guaranteed by clause (1) of Article 32 be meaningful, and particularly because such petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State. To deny access to such information, without citing any constitutional principle or enumerated grounds of constitutional prohibition, would be to thwart the right granted by clause (1) of Article 32.

76. Further, inasmuch as, by history and tradition of common law, judicial proceedings are substantively, though not necessarily fully, adversarial, both parties bear the responsibility of placing all the relevant information, analyses, and facts before this Court as completely as possible. In most situations, it is the State which may have more comprehensive information that is relevant to the matters at hand in such proceedings. However, some agents of the State may perceive that because these proceedings are adversarial in nature, the duty and burden to furnish all the necessary information rests upon the petitioners, and hence the State has no obligation to fully furnish such information. Some agents of the State may also seek to cast the events and facts in a light that is favourable to the Government in the immediate context of the proceedings, even though such actions do not lead to rendering of complete justice in the task of protection of fundamental rights. To that extent, both the petitioners and this Court would be handicapped in proceedings under clause (1) of Article 32.

77. It is necessary for us to note that the burden of asserting, and proving, by relevant evidence a claim in judicial proceedings would ordinarily be placed upon the proponent of such a claim; however, the burden of protection of fundamental rights is primarily the duty of the State. Consequently, unless constitutional grounds exist, the State may not act in a manner that hinders this Court from rendering complete justice in such proceedings. Withholding of information from the petitioners, or seeking to cast the relevant events and facts in a light favourable to the State in the context of the proceedings, even though ultimately detrimental to the essential task of protecting fundamental rights, would be destructive to the guarantee in clause (1) of Article 32, and substantially eviscerate the capacity of this Court in exercising its powers contained in clause (2) of Article 32, and those traceable to other provisions of the Constitution and broader jurisprudence of constitutionalism, in upholding fundamental rights enshrined in Part III.

78. In the task of upholding of fundamental rights, the State cannot be an adversary. The State has the duty, generally, to reveal all the facts and information in its possession to the Court, and also provide the same to the petitioners. This is so, because the petitioners would also then be enabled to bring to light facts and the law that may be relevant for the Court in rendering its decision. In proceedings such as those under Article 32, both the petitioner

a and the State, have to necessarily be the eyes and ears of the Court. Blinding the petitioner would substantially detract from the integrity of the process of judicial decision-making in Article 32 proceedings, especially where the issue is of upholding of fundamental rights.

b 79. Furthermore, we hold that there is a special relationship between clause (1) of Article 32 and sub-clause (a) of clause (1) of Article 19, which guarantees citizens the freedom of speech and expression. The very genesis, and the normative desirability of such a freedom, lies in historical experiences of the entire humanity: unless accountable, the State would turn tyrannical. A proceeding under clause (1) of Article 32, and invocation of the powers granted by clause (2) of Article 32, is a primordial constitutional feature of ensuring such accountability. The very promise, and existence, of a constitutional democracy rests substantially on such proceedings.

c 80. Withholding of information from the petitioners by the State, thereby constraining their freedom of speech and expression before this Court, may be premised only on the exceptions carved out, in clause (2) of Article 19, "in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence" or by law that demarcate exceptions, provided that such a law d comports with the enumerated grounds in clause (2) of Article 19, or that may be provided for elsewhere in the Constitution.

e 81. It is now a well-recognised proposition that we are increasingly being entwined in a global network of events and social action. Considerable care has to be exercised in this process, particularly where Governments which come into being on account of a constitutive document, enter into treaties. The actions of Governments can only be lawful when exercised within the four corners of constitutional permissibility. No treaty can be entered into, or interpreted, such that constitutional fealty is derogated from. The redundancy, that the Union of India presses, with respect to the last sentence of Article 26(1) of the double taxation agreement with Germany, necessarily transgresses upon the boundaries erected by our Constitution. It cannot be f permitted.

g 82. We have perused the documents in question, and heard the arguments of the Union of India with respect to the double taxation agreement with Germany as an obstacle to disclosure. We do not find merit in its arguments flowing from the provisions of double taxation agreement with Germany. However, one major constitutional issue and concern remains. This is with regard to whether the names of individuals, and details of their bank accounts, with respect to whom there has been no completed investigations that reveal wrongdoing and proceedings initiated, and there is no other credible information and evidence currently available with the petitioners that there has been any wrongdoing, may be disclosed to the petitioners.

h 83. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an

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unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values. a

84. The rights of citizens, to effectively seek the protection of fundamental rights, under clause (1) of Article 32 have to be balanced against the rights of citizens and persons under Article 21. The latter cannot be sacrificed on the anvil of fervid desire to find instantaneous solutions to systemic problems such as unaccounted for monies, for it would lead to dangerous circumstances, in which vigilante investigations, inquisitions and rabble rousing, by masses of other citizens could become the order of the day. The right of citizens to petition this Court for upholding of fundamental rights is granted in order that citizens, inter alia, are ever vigilant about the functioning of the State in order to protect the constitutional project. That right cannot be extended to being inquisitors of fellow citizens. An inquisitorial order, where citizens' fundamental right to privacy is breached by fellow citizens is destructive of social order. The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others. b c d

85. An argument can be made that this Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted with the requisite speed and vigour in the case of large volumes of suspected unaccounted for monies of certain individuals. There is an inherent danger in making exceptions to fundamental principles and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself. Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court. However, a decision by this Court that an exception could be carved out remains permanently as a part of judicial canon, and becomes a part of the constitutional interpretation itself. It can be used in the future in a manner and form that may far exceed what this Court intended or what the constitutional text and values can bear. We are not proposing that Constitutions cannot be interpreted in a manner that allows the nation-State to tackle the problems it faces. The principle is that exceptions cannot be carved out willy-nilly, and without forethought as to the damage they may cause. e f g

86. One of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions, would become entrenched as a h

a part of the constitutional order. Such logic would then lead to seeking exceptions, from protective walls of all fundamental rights, on grounds of expediency and claims that there are no solutions to problems that the society is confronting without the evisceration of fundamental rights. That same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale.

b 87. It is indeed true that the information shared by Germany, with regard to certain bank accounts in Liechtenstein, also contains names of individuals who appear to be Indians. The petitioners have also claimed that names of all the individuals have been made public by certain segments of the media. However, while some of the accounts, and the individuals holding those accounts, are claimed to have been investigated, others have not been. No conclusion can be drawn as to whether those who have not been investigated, c or only partially investigated and proceedings not initiated have committed any wrongdoing. There is no presumption that every account-holder in banks of Liechtenstein has acted unlawfully. In these circumstances, it would be inappropriate for this Court to order the disclosure of such names, even in the context of proceedings under clause (1) of Article 32.

d 88. The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrongdoing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals. We cannot remain blind to such possibilities, and indeed experience reveals that public dissemination of banking details, or availability to unauthorised persons, has led to abuse. The mere fact that a citizen has a bank account in a bank located in a particular jurisdiction cannot be a ground for revelation of e details of his or her account that the State has acquired. Innocent citizens, including those actively working towards the betterment of the society and the nation, could fall prey to the machinations of those who might wish to damage the prospects of smooth functioning of society. Whether the State itself can access details of citizens' bank accounts is a separate matter. f However, the State cannot compel citizens to reveal, or itself reveal details of their bank accounts to the public at large, either to receive benefits from the State or to facilitate investigations, and prosecutions of such individuals, unless the State itself has, through properly conducted investigations, within the four corners of constitutional permissibility, been able to establish prima facie grounds to accuse the individuals of wrongdoing. It is only after the State has been able to arrive at a prima facie conclusion of wrongdoing, g based on material evidence, would the rights of others in the nation to be informed, enter the picture. In the event citizens, other persons and entities have credible information that a wrongdoing could be associated with a bank account, it is needless to state that they have the right, and in fact the moral duty, to inform the State, and consequently the State would have the obligation to investigate the same, within the boundaries of constitutional h permissibility. If the State fails to do so, the appropriate courts can always intervene.

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89. The major problem, in the matters before us, has been the inaction of the State. This is so, both with regard to the specific instances of Hassan Ali Khan and the Tapurias, and also with respect to the issues regarding parallel economy, generation of black money, etc. The failure is not of the constitutional values or of the powers available to the State; the failure has been of human agency. The response cannot be the promotion of vigilantism, and thereby violate other constitutional values. The response has to necessarily be a more emphatic assertion of those values, both in terms of protection of an individual's right to privacy and also the protection of individual's right to petition this Court, under clause (1) of Article 32, to protect fundamental rights from evisceration of content because of failures of the State. The balancing leads only to one conclusion—strengthening of the machinery of investigations, and vigil by broader citizenry in ensuring that the agents of State do not weaken such machinery.

90. In light of the above we order that:

(i) The Union of India shall forthwith disclose to the petitioners all those documents and information which they have secured from Germany, in connection with the matters discussed above, subject to the conditions specified in (ii) below;

(ii) That the Union of India is exempted from revealing the names of those individuals who have accounts in banks of Liechtenstein, and revealed to it by Germany, with respect of whom investigations/enquiries are still in progress and no information or evidence of wrongdoing is yet available;

(iii) That the names of those individuals with bank accounts in Liechtenstein, as revealed by Germany, with respect of whom investigations have been concluded, either partially or wholly, and show-cause notices issued and proceedings initiated may be disclosed; and

(iv) That the Special Investigation Team, constituted pursuant to the orders of today by this Court, shall take over the matter of investigation of the individuals whose names have been disclosed by Germany as having accounts in banks in Liechtenstein, and expeditiously conduct the same. The Special Investigation Team shall review the concluded matters also in this regard to assess whether investigations have been thoroughly and properly conducted or not, and on coming to the conclusion that there is a need for further investigation shall proceed further in the matter. After conclusion of such investigations by the Special Investigation Team, the respondents may disclose the names with regard to whom show-cause notices have been issued and proceedings initiated.

91. Compliance reports shall be filed by the respondents, with respect of all the orders issued by this Court today. List for further directions in the week following Independence Day, 15-8-2011. Ordered accordingly.

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(BEFORE DR B.S. CHAUHAN AND SWATANTER KUMAR, JJ.)

RAMLILA MAIDAN INCIDENT. IN RE:

d

Suo Motu WP (Crl.) No. 122 of 2011\*, decided on February 23, 2012

A. Constitution of India — Arts. 19(1)(a) & (b) and (2) & (3), 21 and 32 and Preamble — Public meetings, rallies and demonstrations — Public conducting itself in orderly fashion and agitating peacefully — Proper and permissible response of State and police in case of apprehension of breach of peace, disorder, etc., despite the public being in a peaceful state

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— Police crackdown at midnight on members of public sleeping in enclosed public ground, who were a part of public agitation spread over a number of days — Propriety — Ramlila Maidan incident of 4-6-2011/5-6-2011 — Imposition of prohibitory order at night and hasty and forcible evacuation of sleeping public by police which resorting to violence to force the evacuation — Suo motu probe of incident ordered by Supreme Court on

f

basis of media reports and CCTV camera footage — Police found to have misused its power and leader of agitation, a Yoga Guru also found partly responsible — Directions issued for initiation of disciplinary and criminal action against police officials/persons concerned, and for remedial action and payment of compensation to victims of incident

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— Permission granted to Yoga Guru, Baba Ramdev for holding yoga camp from 1-6-2011 to 20-6-2011 at Ramlila Maidan in New Delhi abruptly withdrawn on the night of 4-6-2011, and prohibitory order imposed under S. 144 CrPC, 1973 — Action taken on pretext that Yoga Guru instead of using premises exclusively for yoga camp as permitted, was promoting his agitation against black money and corruption — Huge gathering of people allegedly expected on Baba Ramdev commencing indefinite hunger strike on 4-6-2011 as part of abovesaid agitation — Apprehension raised that swelling

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\* Under Article 32 of the Constitution of India

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crowd may cause danger to human life and disturbance of public tranquillity — Yoga Guru and his supporters asked to leave Ramlila Maidan at midnight itself — Yoga Guru not cooperating with police in implementation of prohibitory order though he appealed to his supporters to remain peaceful — Confrontation leading to caning and tear gas shelling from police side and stone-pelting from public side — Several persons including police personnel injured and one woman succumbing to injuries later on — Hasty police action at odd hours was in fact a fallout of talks' failure on preceding day (3-6-2011) between Yoga Guru and representatives of Central Government which was trying to persuade Yoga Guru to call off his agitation against black money

— Police action, held (*per curiam*), unconstitutional inasmuch as there was no justification to compel sleeping public to leave at night when there was no immediate danger of peace being disturbed — Necessary procedural safeguards like public announcement of promulgation, banner display of prohibitory order and prior warning before use of force, also not observed by police — Yoga Guru also found to be partly responsible for incident — It was his legal and moral duty to obey prohibitory order — His cooperation might have avoided police-public confrontation and resultant damage to life and property — Contributory negligence of organisers of yoga camp — Held, organisers by refusing to cooperate with police contributed to sufferings of people and were therefore also liable

— Remedial and compensatory measures directed (*per curiam*) — Disciplinary action directed to be taken against police officials who used undue force or failed to render assistance to injured persons — Criminal cases directed to be registered both against police officials and members of public who resorted to violence — Compensation of Rs 5 lakhs awarded to legal heirs of lady who died as a result of this incident — Compensation of Rs 50,000 awarded to each of persons who were hospitalised due to serious injuries — Compensation of Rs 25,000 also awarded to each of persons who were discharged after simple medical treatment — Liability for monetary compensation apportioned between State and Yoga Guru in ratio of 3:1 — Such compensation to be treated as ad hoc compensation, and victims, further held, could claim additional compensation by moving competent court — Administrative Law — Administrative Action — Administrative or Executive Function — Colourable/Arbitrary/Mala fide Exercise of Power — Criminal Procedure Code, 1973 — S. 144 — Penal Code, 1860, S. 187

B. Constitution of India — Arts. 32, 136 and 226 — Public law compensation — Police excesses — Violation of fundamental rights — Compensation awarded — Maxims — *Injuria non excusat injuriam*

C. Service Law — Departmental Enquiry — Initiation of — Court direction regarding — Misconduct — Improper exercise of official power

D. Criminal Procedure Code, 1973 — Ss. 144 and 134 — Prohibitory order under S. 144 — Enforcement of — Necessity of strict compliance with requirements of publication/affixation — Penal Code, 1860 — Ss. 151, 152, 159 and 160 — Police — Delhi Police Standing Orders — Standing Order 309

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- Baba Ramdev was a world-famous Yoga Guru who had large following in India, Bharat Swabhinnan Trust, Delhi Pradesh (Baba Ramdev's trust).
- a Respondent 4 sought permission from Municipal Corporation of Delhi for organising a yoga camp for 4 to 5 thousand people at a public ground popularly known as Ramlila Maidan in Delhi from 1-6-2011 to 20-6-2011. A conditional no-objection certificate was granted by the police in this regard. The camp was however virtually used as a venue for mobilising public opinion against Indian black money stashed in foreign countries and to pressurise the Government to bring back the money in India. The Government tried to convince Yoga Guru that necessary steps were being taken in this direction and therefore this should not be made a subject-matter of public agitation at this stage. The discussion between Yoga Guru and the Central Government failed and there was a police crackdown on the night between 4-6-2011 and 5-6-2011. Media reports showed the police forcibly evicting the sleeping public from Ramlila Maidan by caning and use of tear gas and a commotion ensued resulting in injuries to several persons.
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Severely criticising the handling of the situation by the police authorities, the Supreme Court

*Held :*

*Per Swatanter Kumar, J.*

- d The police could have avoided the tragic incident by exercising greater restraint, patience and resilience. The orders were passed by the authorities in undue haste and were executed with force and overzealousness, as if an emergent situation existed. The decision to forcibly evict the innocent public sleeping at the Ramlila Ground in the midnight of 4-6-2011/5-6-2011, whether taken by the police independently or in consultation with the Ministry of Home Affairs is amiss and suffers from the element of arbitrariness and abuse of power to some extent. The restriction imposed on the right to freedom of speech and expression was unsupported by cogent reasons and material facts. It was an invasion of the people's liberties and exercise of fundamental freedoms. The members of the assembly had legal protections available to them even under the provisions of CrPC. Thus, the restriction was unreasonable and unwarrantedly executed. The action demonstrated the might of the State and was an assault on the very basic democratic values enshrined in the Constitution of India. Except in cases of emergency or the situation unexceptionably demanding so, reasonable notice/ time for execution of the order or compliance with the directions contained in the order itself or in furtherance thereto is the prerequisite. It was primarily an error of performance of duty both by the police and Respondent 4 and Baba Ramdev, the Yoga Guru but the ultimate sufferer was the public at large. It was not a case of emergency. The police have failed to establish that a situation had arisen where there was imminent need to intervene, having regard to the sensitivity and perniciously perilous consequences that could have resulted, if such harsh measures had not been taken forthwith. (Paras 286.2, 286.3 and 170 to 181)
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- f
- g

*Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423, *relied on*

- h Respondent 4 (the trust run by Baba Ramdev) is guilty of contributory negligence. The Trust and its representatives ought to have discharged their legal and moral duty and should have fully cooperated in the effective implementation



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of a lawful order passed by the competent authority under Section 144 CrPC. Due to the stature that Baba Ramdev enjoyed with his followers, it was expected of him to request the gathering to disperse peacefully and leave the Ramlila Maidan. He ought not have insisted on continuing with his activity at the place of occurrence. Respondent 4 and all its representatives were bound by the constitutional and fundamental duty to safeguard public property and to abjure violence. There was legal and moral duty cast upon the members of the Trust to request and persuade people to leave the Ramlila Maidan which could have obviously avoided the confrontation between the police and the members of the gathering at the Ramlila Maidan. (Para 286.6)

*Per Chauhan, J.*

The prohibitory order was sought to be enforced on a sleeping crowd which was not a violent crowd. The prohibitory order was enforced without any announcement as prescribed for being published or by its affixation in terms of Delhi Police Standing Order 309 read with Section 134 CrPC. There may be a reason available to impose prohibitory orders calling upon an assembly to disperse but there does not appear to be any plausible reason for the police to resort to blows on a sleeping crowd and to throw them out of their encampments abruptly. The affidavits and explanation given by the police officials do not disclose as to why the police could not wait till morning and provide a reasonable time to this crowd to disperse peacefully. The undue haste caused a huge disarray and resulted in a catastrophe that was witnessed on media and television throughout the country. There is no explanation for the gravity or the urgent situation requiring such an emergent action at this dark hour of midnight. In the absence of any such justification there is no option but to deprecate such action and it also casts a serious doubt about the existence of the sufficiency of reasons for such action. The incident in question is an example of a weird expression of the desire of a tyrannical mind to threaten peaceful life suddenly for no justification. This coupled with what is understood of sleep, makes it clear that the precipitate action was nothing but a clear violation of human rights and a definite violation of the procedure for achieving the end of dispersing a crowd. (Paras 298 and 304)

*State of Saurashtra v. Memon Haji Ismail Haji Valimohammed*, AIR 1959 SC 1383, relied on

People at large, sleeping in tents, had not been informed about the promulgation (of the prohibitory order) and were not asked to leave the place. There had only been a dispute regarding the service of the orders on the organisers. Therefore, there was utter confusion and the gathering could not even understand what the real dispute was and had reason to believe that police was trying to evict Baba Ramdev forcibly. At no point of time was the assembly declared to be unlawful. The police administration is to be blamed for not implementing the order by strict adherence to the procedural requirements. People at large have a legitimate expectation that the executive authority would ensure strict compliance with the procedural requirements and would certainly not act in derogation of the applicable regulations. The present is a clear-cut case of human rights violation. (Para 324)

There was no gossip or discussion of something untrue that was going on. To the contrary, it was an assembly of followers, under a peaceful banner of yogic

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- a training, fast asleep. The assembly was at least, purportedly, a conglomeration of individuals gathered together, expressive of a determination to improve the material condition of the human race. The aim of the assembly was *prima facie* unobjectionable and was not to inflame passions. It was to ward off something harmful. What was suspicious or conspiratorial about the assembly, may require an investigation by the appropriate forum but the implementation of the prohibitory order appears to have been done in an unlawful and derogatory manner that did violate the basic human rights of the crowd to have a sound sleep which is also a constitutional freedom, acknowledged under Article 21 of the Constitution of India. (Para 325)

- b Judicially and on the strength of impartial logic, such an attempt cannot be permitted or justified, as a sleeping crowd cannot be included within the bracket of an unlawful category unless there is sufficient material to brand it as such. The facts as uncovered and the procedural mandate having been blatantly violated, is malice in law and also the part played by the police and the administration shows the outrageous behaviour which cannot be justified by law in any civilised society. The respondents are forewarned to prevent any repetition of such hasty and unwarranted act affecting the safe living conditions of the citizens/persons in this country. (Paras 328 and 329)

[Ed.: The directions for disciplinary action, criminal action and award of compensation, etc. are contained in paras 158, 286.17 to 286.19 and 287.]

- d E. Constitution of India — Art. 21 — Sleep as a human right — Nature and scope — Sleep, held (*per Chauhan, J.*), is a biological necessity — Its deprivation affects a person's health and mental condition — Interference with a person's sleep is therefore a form of third-degree method of torture prohibited by Constitution — Human and Civil Rights — Right to sleep

*Held :*

- e An individual is entitled to sleep as comfortably and as freely as he breathes. Sleep is essential for a human being to maintain the delicate balance of health necessary for its very existence and survival. Sleep is, therefore, a fundamental and basic requirement without which the existence of life itself would be in peril. To disturb sleep, therefore, would amount to torture which is now accepted as a violation of human right. It would be similar to a third degree method which at times is sought to be justified as a necessary police action to extract the truth out of an accused involved in heinous and cold-blooded crimes. It is also a device adopted during warfare where prisoners of war and those involved in espionage are subjected to treatments depriving them of normal sleep. (Para 327)

- f In many countries there are complete night curfews (at the airport i.e. banning of landing and taking off between the night hours), for the reason that the concept of sound sleep has been associated with sound health which is an inseparable facet of Article 21 of the Constitution. Various statutory provisions prohibit the arrest of a judgment-debtor, a woman in the night and restrain the entering of, in the night into a constructed area suspected to have been raised in violation of the sanctioned plan, master plan or zonal plan for the purpose of survey or demolition. (Para 315)

- h While determining such matters the crucial issue in fact is not whether such rights exist, but whether the State has a compelling interest in the regulation of a subject which is within the police power of the State. Reasonable regulation of

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time, place and manner of the act of sleeping would not violate any constitutional guarantee. But, State authorities cannot deprive a sleeping person of that right anywhere and at all times. (Para 316)

*Jaspal Singh v. State of Punjab*, (2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1, *relied on*

Right of privacy and the right to sleep have always been treated to be a fundamental right like a right to breathe, to eat, to drink, to blink, etc. (Para 318)

[Ed.: Biological and psychological aspects of sleep have been explained in paras 299 to 303 of the judgment.]

**F. Constitution of India — Arts. 21, 19 and Preamble — Security of citizens — Protection of privacy and human dignity — Held (*per Chauhan, J.*), are primary tasks of Government — Restrictions on privacy — Held, ought to be just, fair and reasonable — State power has to be exercised within constitutional limitations**

*Held :*

The primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. (Para 306)

*GVK Industries Ltd. v. ITO*, (2011) 4 SCC 36; *Nandini Soodar v. State of Chhattisgarh*, (2011) 7 SCC 547 : (2011) 2 SCC (L&S) 762; *Modhuv Rao Jivaji Rao Scindia v. Union of India*, (1971) 1 SCC 85; *Monilal Padampat Sugar Mills Co. Ltd. v. State of U.P.*, (1979) 2 SCC 409 : 1979 SCC (Tax) 144; *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92, *relied on*

Privacy and dignity of human life has always been considered a fundamental human right of every human being like any other key values such as freedom of association and freedom of speech. Therefore, every act which offends or impairs human dignity tantamounts to deprivation pro tanto of his right to live and the State action must be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. (Para 309)

*Francis Coralie Mullin v. UT of Delhi*, (1981) 1 SCC 608 : 1981 SCC (Cri) 212, *relied on*

**G. Constitution of India — Arts. 38, 39, 42, 47, 48-A and 51-A and Preamble — India as a welfare State — Protection to all forms of life created by nature — Constitutional goal on this aspect highlighted (*per Chauhan, J.*) — Animals, Birds and Fish — Rights of — Environment Protection and Pollution Control — Ecocentricity — Posited**

*Held :*

The Constitution does not merely speak of human rights protection. It also speaks of preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment. The Constitution of India professes for collective life and collective responsibility on the one hand and individual rights and responsibilities on the other hand. (Para 310)

*Kharak Singh v. State of U.P.*, AIR 1963 SC 1295 : (1963) 2 Cri LJ 329; *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301, *relied on*

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- a H. Constitution of India — Arts. 21 and 19 — Right to life — Privacy, right to silence, freedom from noise and to have proper rest and sleep, as essential constituents of right to life — Held (*per Chauhan, J.*), are guaranteed by Constitution subject to certain just and fair exceptions — Tort Law — Nuisance — Freedom from noise — Public law underpinning of

Held :

- b Citizens/persons have a right to leisure, to sleep, not to hear and to remain silent. The knock at the door, whether by day or by night, as a prelude to a search without authority of law amounts to be police incursion into privacy and violation of fundamental right of a citizen. Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under the Constitution. Such a right has been extended even to woman of easy virtues as she has been held to be entitled to her right of privacy.
- c However, right of privacy may not be absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right. The courts have always imposed the penalty on disturbing peace of others by using the amplifiers or beating the drums even in religious ceremonies. (Paras 311, 312 and 314)

- d *Wolf v. Colorado*, 93 L Ed 1782 : 338 US 25 (1949); *Malak Singh v. State of P&H.* (1981) 1 SCC 420 : 1981 SCC (Cri) 169; *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57 : 1991 SCC (Cri) 1; *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *Mr 'X' v. Hospital 'Z'*, (1998) 8 SCC 296; *Sharda v. Dharmpal*, (2003) 4 SCC 493; *People's Union for Civil Liberties v. Union of India*, (2003) 4 SCC 399; *District Registrar and Collector v. Canara Bank*, (2005) 1 SCC 496; *Bhavesh Jayanti Lakhani v. State of Maharashtra*, (2009) 9 SCC 551 : (2010) 1 SCC (Cri) 47; *Selvi v. State of Karnataka*, (2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1; *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310; *Rabin Mukherjee v. State of W.B.*, AIR 1985 Cal 222; *Barabazar Fire Works Dealers Assn. v. Commn. of Police*, AIR 1998 Cal 121; *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn.*, (2000) 7 SCC 282 : 2000 SCC (Cri) 1350; *Noise Pollution (7). In re.*, (2005) 8 SCC 796, *relied on*

- f 1. Constitution of India — Arts. 19(1)(b) & (a) and (2) & (3) and Preamble — Public meeting — Regulation of time and place besides looking into its content/subject-matter — Permissibility — Prohibitory order under S. 144 CrPC, 1973 — Permissibility to invoke in larger public interest — Reasonable restrictions, held (*per Swatanter Kumar, J.*), can be imposed on public meeting in larger public interest — Content/subject-matter of meeting is not the only concern of authority competent to grant permission — Criminal Procedure Code, 1973, S. 144

Held :

- g The right to hold meetings in public places is subject to control of the appropriate authority regarding the time and place of the meeting. Orders, temporary in nature, can be passed to prohibit the meeting or to prevent an imminent breach of peace. Such orders constitute reasonable restriction upon the freedom of speech and expression. The content is not the only concern of the controlling authority but the time and place of the meeting is also well within its jurisdiction. If the authority anticipates an imminent threat to public order or public tranquillity, it would be free to pass desirable directions within the
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parameters of reasonable restrictions on the freedom of an individual. However, provisions of Section 144 CrPC are attracted only in emergent situations. The emergent power is to be exercised for the purposes of maintaining public order.

(Para 54)

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*Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Union of India v. Assn. for Democratic Reforms*, (2002) 5 SCC 294, *relied on*

J. Constitution of India — Arts. 19(1)(a) & (b) and Preamble — Hunger strike — Threat of — Held (*per Swatanter Kumar, J.*), is a form of protest permissible under law — Penal Code, 1860, S. 309

b

*Held :*

The threat of going on a hunger strike extended by Baba Ramdev to personify his stand on the issues raised, cannot be termed as unconstitutional or barred under any law. It is a form of protest which has been accepted, both historically and legally in the constitutional jurisprudence of India. (Para 209)

K. Constitution of India — Art. 19 — Scope and extent of six freedoms conferred under Art. 19(1) — Principles reiterated — “Reasonable” — Meaning and scope — Said freedoms, held, are neither absolute nor completely obliterated — Constitution adopts a middle course — Imposition of reasonable restrictions is permissible within parameters prescribed in Arts. 19(2) to (6) so as to avoid anarchy and chaos — Purpose is to strike proper balance for meaningful enjoyment of rights by society as a whole — State ought to follow least invasive approach and must act openly and fairly, yet restrictions can be suitably tailored depending upon gravity of situation to be tackled — Law and order problem for example calls for least restriction, public order problem may justify greater restriction while threat to security of State may warrant maximum restriction — Restrictions however are subject to judicial review so as to check State arbitrariness or highhandedness — Prohibitory order imposed under S. 144 CrPC, 1973 — Held, being a restriction on freedoms under Arts. 19(1)(a) & (b), is subject to judicial review — Criminal Procedure Code, 1973, S. 144

c

d

e

L. Constitution of India — Arts. 19(2) to (6) and 21 — Reasonability of restrictions — Touchstone for — Restrictions, held, must be just, fair and reasonable as in the case of due process requirement under Art. 21 — Restrictions backed by law, like prohibitory order S. 144 CrPC, 1973 — Held, such restrictions must withstand test of reasonableness — Criminal Procedure Code, 1973 — S. 144 — Rule of Law

f

M. Constitution of India — Arts. 19(2) to (6) — Restrictions on six freedoms available under Art. 19(1) — Burden of proof to justify reasonability — Reversal of burden on State when violation of right *prima facie* proved

g

*Held :*

*Per Swatanter Kumar, J.*

No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the following tests emerge: (a) The restriction can be imposed only by or under the authority of law. It

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cannot be imposed by exercise of executive power without any law to back it up. (b) Each restriction must be reasonable. (c) A restriction must be related to the purpose mentioned in Article 19(2). (Para 30)

- a The legislative determination of what restriction to impose on a freedom is final and conclusive, as it is not open to judicial review. It is difficult to define or explain the word "reasonable" with any precision. It will always be dependent on the facts of a given case with reference to the law which has been enacted to create a restriction on the right. It is neither possible nor advisable to state any abstract standard or general pattern of reasonableness as applicable uniformly to all cases. (Para 31)

*State of Madras v. V.G. Row*, AIR 1952 SC 196 : 1952 Cri LJ 966, *relied on*

- c For adjudging the reasonableness of a restriction, factors such as the duration and extent of the restrictions, the circumstances under which and the manner in which that imposition has been authorised, the nature of the right infringed, the underlining purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, amongst others, enter into the judicial verdict. (Para 32)

*Chintamanrao v. State of M.P.*, AIR 1951 SC 118, *relied on*

- d The courts must bear a clear distinction in mind with regard to "restriction" and "prohibition". They are expressions which cannot be used interchangeably as they have different connotations and consequences in law. Wherever a "prohibition" is imposed, besides satisfying all the tests of a reasonable "restriction", it must also satisfy the requirement that any lesser alternative would be inadequate. Furthermore, whether a restriction, in effect, amounts to a total prohibition or not, is a question of fact which has to be determined with regard to facts and circumstances of each case. (Para 33)

- e *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 SCC 534, *relied on*

- f A restriction imposed in any form has to be reasonable and to that extent, it must stand the scrutiny of judicial review. It cannot be arbitrary or excessive. It must possess a direct and proximate nexus with the object sought to be achieved. Whenever and wherever any restriction is imposed upon the right to freedom of speech and expression, it must be within the framework of the prescribed law, as subscribed by Article 19(2) of the Constitution. (Para 35)

- g The restriction must be provided by law in a manner somewhat distinct to the term "due process of law" as contained in Article 21 of the Constitution. If the orders passed by the executive are backed by a valid and effective law, the restriction imposed thereby is likely to withstand the test of reasonableness, which requires it to be free of arbitrariness, to have a direct nexus to the object and to be proportionate to the right restricted as well as the requirement of the society, for example, an order passed under Section 144 CrPC. This order is passed on the strength of a valid law enacted by Parliament. The order is passed by an executive authority declaring that at a given place or area, more than five persons cannot assemble and hold a public meeting. There is a complete channel provided for examining the correctness or otherwise of such an order passed under Section 144 CrPC and, therefore, it has been held that such order falls within the framework of reasonable restriction. (Para 43)

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In spite of there being a general presumption in favour of the constitutionality of a legislation under challenge alleging violation of the right to freedom guaranteed by Article 19(1) of the Constitution, on a prima facie case of such violation being made out, the onus shifts upon the State to show that the legislation comes within the permissible restrictions set out in Articles 19(2) to (6) and that the particular restriction is reasonable. It is for the State to place on record appropriate material justifying the restriction and its reasonability. Reasonability of restriction is a matter which squarely falls within the power of judicial review of the courts. Such limitations, therefore, indicate two purposes; one that the freedom is not absolute and is subject to regulatory measures and the second that there is also a limitation on the power of the legislature to restrict these freedoms. The legislature has to exercise these powers within the ambit of Article 19(2) of the Constitution. (Para 25)

The State has a duty to protect itself against certain unlawful actions and, therefore, may enact laws which would ensure such protection. The right that springs from Article 19(1)(a) is not absolute and unchecked. There cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraint, the rights and freedoms may become synonymous with anarchy and disorder. (Paras 13 and 14)

*State of W.B. v. Subodh Gopal Bose*, AIR 1954 SC 92, *relied on*

Where the court applies the test of "proximate and direct nexus with the expression", the court also has to keep in mind that the restriction should be founded on the principle of least invasiveness i.e. the restriction should be imposed in a manner and to the extent which is unavoidable in a given situation. The court would also take into consideration whether the anticipated event would or would not be intrinsically dangerous to public interest. (Para 28)

The distinction between "public order" and "law and order" is a fine one, but nevertheless clear. A restriction imposed with "law and order" in mind would be least intruding into the guaranteed freedom while "public order" may qualify for a greater degree of restriction since public order is a matter of even greater social concern. Out of all expressions used in this regard, as discussed in the earlier part of this judgment, "security of the State" is the paramount and the State can impose restrictions upon the freedom, which may comparatively be more stringent than those imposed in relation to maintenance of "public order" and "law and order". However stringent may these restrictions be, they must stand the test of "reasonability". The State would have to satisfy the court that the imposition of such restrictions is not only in the interest of the security of the State but is also within the framework of Articles 19(2) and 19(3) of the Constitution. (Para 44)

*Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cr LJ 16 : (1961) 3 SCR 423; *Madhus Limaye v. Sub-Divisional Magistrate, Monghyr*, (1970) 3 SCC 746; *Himmat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 227 : 1973 SCC (Cri) 280, *relied on*

There is a direct as well as implied responsibility upon the Government to function openly and in public interest. Each citizen of India is entitled to enforce his fundamental rights against the Government subject to any reasonable restrictions as may be imposed under law. The Government can, in larger public interest, take a decision to restrict the enforcement of freedom, however, only for a valid, proper and justifiable reason. Such a decision cannot be arbitrary or capricious. Another important facet of exercise of such power is that such restriction has to be enforced with least invasion. (Paras 26, 178 and 179)

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- The constitutional protection available to the citizens of India for exercising their fundamental rights has a great significance in the Constitution of India. Article 13 is indicative of the significance that the Framers of the Constitution intended to attach to the fundamental rights of the citizens. Wherever the State proposes to impose a restriction on the exercise of the fundamental rights, such restriction has to be reasonable and free from arbitrariness. It is for the Court to examine whether the circumstances which existed at the relevant time were of such imminent and urgent nature that it required passing of a preventive order within the scope of Section 144 CrPC, on the one hand, and on the other, of imposing a restriction on exercise of a fundamental right by Respondent 4 and persons present therein by withdrawing the permissions granted and enforcing dispersal of the gathering at the Ramlila Maidan at such an odd hour. (Para 206)

- N. Constitution of India — Arts. 19(1)(a) & (b) and (2) & (3), 21 and Preamble — Prohibitory order under S. 144 CrPC, 1973 — Held (*per Swatanter Kumar, J.*), *per se* is not an unreasonable restriction provided order is passed within parameters set in S. 144 itself — Order however is open to judicial review — Criminal Procedure Code, 1973 — S. 144 — Rule of Law

Held:

- An order passed in anticipation by the Magistrate empowered under Section 144 CrPC is not an encroachment of the freedom granted under Articles 19(1)(a) and (b) of the Constitution and it is not regarded as an unreasonable restriction. It is an executive order, open to judicial review. In exercise of its executive power the executive authority, by a written order and upon giving material facts, may pass an order issuing a direction requiring a person to abstain from doing certain acts or take certain actions/orders with respect to certain properties in his possession, if the officer considers that such an order is likely to prevent or tends to prevent obstruction, annoyance or injury to any other person. (Para 188)

O. Constitution of India — Arts. 19(2) to (6) — Restrictions on fundamental rights — Significance of expression “in the interest of” — Held (*per Swatanter Kumar, J.*), confers wide scope for imposing reasonable restrictions

Held:

- The expression “in the interest of” has given a wide amplitude to the permissible law which can be enacted to impose reasonable restrictions on the rights guaranteed by Article 19(1) of the Constitution. (Para 38)

- P. Constitution of India — Arts. 19(1)(a) & (b) and (2) & (3) and Preamble — Freedom of speech and expression and freedom to assemble — Scope of right — Indian and US positions compared — Said freedom in India, held (*per Swatanter Kumar, J.*), is not as wide as in USA — Constitution of USA — First Amendment

Held:

- The effect of use of wide expressions in the First Amendment to the US Constitution was that the freedom of speech of press was considered absolute and free from any restrictions whatsoever. Shortly thereafter, as a result of widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of “clear and present danger”. However,



application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of "balancing of interests". The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Frankfurter, J. often applied the abovementioned balancing formula and concluded that "while the court has emphasised the importance of 'free speech', it has recognised that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations." (Paras 2 and 3)

*Niemotko v. Maryland*, 95 LEd 267, at 276 : 340 US 268, at 282 (1951), *relied on*

The "balancing of interests" approach is basically derived from Roscoe Pound's theories of social engineering. Pound had insisted that his structure of public, social and individual interests are all, in fact, individual interests looked at from different points of view for the purpose of clarity. Therefore, in order to make the system work properly, it is essential that when interests are balanced, all claims must be translated into the same level and carefully labelled. Thus, a social interest may not be balanced against individual interest, but only against another social interest. The author points out that throughout the heyday of the "clear and present danger" and "preferred position" doctrines, the language of balancing, weighing or accommodating interests was employed as an integral part of the libertarian position. (Para 4)

Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966), *quoted*

Even in the United States there is a recurring debate in modern First Amendment jurisprudence as to whether First Amendment rights are "absolute" in the sense that the Government may not abridge them at all or whether the First Amendment requires the "balancing of competing interests" in the sense that free speech values and the Government's competing justification must be isolated and weighed in each case. Although the First Amendment to the American Constitution provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of the constitutional Government to survive. If it is to survive, it must have the power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts. Freedom of speech, thus, does not comprehend the right to speak on any subject at any time. (Para 5)

*Schenck v. United States*, 63 L Ed 470 : 249 US 47 (1919), *relied on*

Dr L.M. Singhvi: *Constitution of India* (2nd Edn.), Vol. I, *quoted*

In the face of the constitutional mandate contained in Articles 19(1)(a), (1)(b), (2) and (3) of the Indian Constitution, the American doctrine adumbrated in *Schenck case*, 63 L Ed 470 cannot be imported and applied. Under the Indian Constitution, this right is not an absolute right but is subject to the above noticed restrictions. Thus, the position under the Indian Constitution is different. The fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. The right to freedom of speech and

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- a expression is not violated by a law which requires that the name of the printer and publisher and the place of printing and publication should be printed legibly on every book or paper. There is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws.

(Paras 7, 8, 10 and 11)

*Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423, followed

*Schenck v. United States*, 63 L Ed 470 : 249 US 47 (1919), limited

- b H.M. Seervai: *Constitutional Law of India* (4th Edn.), Vol. 1, quoted

- c Q. Constitution of India — Arts. 19(1)(a), 25 and Preamble — Right to speech and expression an undeniable human right — Held (*per Sivasankar Kumar, J.*), it is basic human nature to give vent to one's inner feelings through speech and expression — Belief too is inherent in human nature — Figuratively, belief, thought and expression are three angles of a triangle which cannot be separated from one another — All other freedoms spring from this freedom

Held:

- d The freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press. The Framers of the Constitution of India, in unambiguous terms, granted the right to freedom of speech and expression and the right to assemble peaceably and without arms. This gave to the citizens of this country a very valuable right, which is the essence of any democratic system. There could be no expression without these rights. Liberty of thought enables liberty of expression. Belief occupies a place higher than thought and expression. Belief of people rests on liberty of thought and expression. Placed as the three angles of a triangle, thought and expression would occupy the two corner angles on the baseline while belief would have to be placed at the upper angle. Attainment of the Preambular liberties is eternally connected to the liberty of expression. (Paras 10 to 12)

R.C. Lahoti, *Preamble: The Spirit and Backbone of the Constitution of India*, relied on

- g [Ed.: In this regard it may be useful to consider that Article 25 provides for the right to freedom of conscience as a right distinct from the right freely to profess, practise and propagate religion. In fact, if in the triangle postulated above, the freedom of belief is at the apex, then the freedom of conscience would come at the apex of all rights! Article 25(1) provides:

- h 25. Freedom of conscience and free profession, practice and propagation of religion. — (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.]

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R. Constitution of India — Arts. 19(1)(a) & (b), 25, 21, 14 and Preamble and Arts. 73 & 162 — Freedom of speech and to assemble peaceably — State's duty to make available safe environment for fruitful enjoyment of rights — Held (*per Swatanter Kumar, J.*), State has multi-dimensional role including protection of its citizens — State is therefore obliged to ensure safety of people participating in a public meeting — Rule of Law — Administrative Law — Administrative Action — Administrative or Executive Function — Fairness in Action — Executive Wing of State — Exercise of executive power — Fairness in action

Held :

There is a direct and not merely implied responsibility upon the Government to function openly and in public interest. The right to information itself emerges from the right to freedom of speech and expression. Unlike an individual, the State owns a multi-dimensional responsibility. It has to maintain and ensure security of the State as well as the social and public order. It has to give utmost regard to the right to freedom of speech and expression which a citizen or a group of citizens may assert. The State also has a duty to provide security and protection to the persons who wish to attend such assembly at the invitation of the person who is exercising his right to freedom of speech or otherwise.

(Paras 26, 178 and 179)

*S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574, *relied on*

S. Constitution of India — Arts. 21, 14 and 19 and Preamble — "Liberty" — True import of — Reasonableness as hallmark of valid administrative and legislative actions (*per Swatanter Kumar, J.*) — Administrative Law — Administrative Action — Administrative or Executive Function — Non-arbitrariness and reasonableness in action — Rule of Law

Held :

The term "liberty", which is subject to reasonable restrictions, needs to be examined with reference to the other constitutional rights. Article 21 is the foundation of the constitutional scheme. The procedure established by law for deprivation of rights conferred by this article must be fair, just and reasonable. The rules of justice and fair play require that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness, thereby vitiating the law which prescribed that procedure and, consequently, the action taken thereunder. Any action taken by a public authority which is entrusted with the statutory power has, therefore, to be tested by the application of two standards— first, the action must be within the scope of the authority conferred by law and, second, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it means that the procedure established under which that action is taken is itself unreasonable. The law itself has to be reasonable and furthermore, the action under that law has to be in accordance with the law so established. Non-observance of either of this can vitiate the action, but if the former is invalid, the latter cannot withstand. (Paras 15 to 17)

*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544 : 1978 SCC (Cri) 468, *relied on*

a T. Constitution of India — Pt. III and Art. 13 — Fundamental rights vis-à-vis laws framed by legislature — Overriding effect of fundamental rights subject to exceptions created within Pt. III — Art. 13, held, is repository of various protections given to individuals (citizens or otherwise) against violation of their fundamental rights (Para 18)

b U. Constitution of India — Pts. IV and III, Art. 37 and Arts. 21 and 21-A — Directive principles — Lifting up of their status equivalent to fundamental rights on certain aspects — Instances of directive principles being given same recognition as fundamental rights — Right to free and compulsory education, recognised now as fundamental right (*per Swatanter Kumar, J.*) — Education and Universities — Right of Children to Free and Compulsory Education Act, 2009, Ss. 3 and 4

Held :

c With the development of law, even certain matters covered under Part IV of the Constitution relating to directive principles have been uplifted to the status of fundamental rights, for instance, the right to education. Though this right forms part of the directive principles of State policy, compulsory and primary education has been treated as a part of Article 21 of the Constitution of India by the courts, which consequently led to the enactment of the Right of Children to Free and Compulsory Education Act, 2009. (Para 20)

d V. Constitution of India — Pts. III, IV and IV-A and Preamble — Fundamental rights, directive principles and fundamental duties — Composite scheme to achieve social order which affords liberty to all — Unbridled individual rights, held, will create imbalance in society — Appropriate proportion therefore has to be maintained between individual rights and collective rights of society as a whole which imply observance of fundamental duties by individuals — Directive principles as community rights — Words and Phrases — “Social order” — Contents of — “Public order”, “law and order” and “security of State” — Jurisprudence — Social order

W. Constitution of India — Arts. 19(2) to (6) and 51-A — Fundamental duties as facets of reasonable restrictions under Arts. 19(2) to (6)

Held :

f *Per Swatanter Kumar, J.*

g A common thread runs through Parts III, IV and IV-A of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts. (Para 22)

h As difficult as it is to anticipate the right to any freedom or liberty without any reasonable restriction, equally difficult it is to imagine the existence of a right not coupled with a duty. The duty may be a direct or indirect consequence of a fair assertion of the right. Part III of the Constitution of India although confers rights, still duties and restrictions are inherent thereunder. These rights are basic in nature and are recognised and guaranteed as natural rights, inherent in the status of a citizen of a free country, but are not absolute in nature and uncontrolled in operation. Each one of these rights is to be controlled, curtailed

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and regulated, to a certain extent, by laws made by Parliament or the State Legislature. (Para 24)

Rights, restrictions and duties coexist. As, on the one hand, it is necessary to maintain and preserve the freedom of speech and expression in a democracy, there, on the other, it is also necessary to place reins on this freedom for the maintenance of social order. The term "social order" has a very wide ambit. It includes "law and order", "public order" as well as "the security of the State". The security of the State is the core subject and public order as well as law and order follow the same. (Para 36)

There has to be a balance and proportionality between the right and restriction on the one hand, and the right and duty, on the other. It will create an imbalance, if undue or disproportionate emphasis is placed upon the right of a citizen without considering the significance of the duty. The true source of right is duty. When the courts are called upon to examine the reasonableness of a legislative restriction on exercise of a freedom, the fundamental duties enunciated under Article 51-A are of relevant consideration. Article 51-A requires an individual to abide by the law, to safeguard public property and to abjure violence. It also requires the individual to uphold and protect the sovereignty, unity and integrity of the country. All these duties are not insignificant. Part IV of the Constitution relates to the directive principles of the State policy. Article 38 was introduced in the Constitution as an obligation upon the State to maintain social order for promotion of welfare of the people. By the Constitution (Forty-second Amendment) Act, 1976, Article 51-A was added to comprehensively state the fundamental duties of the citizens to complement the obligations of the State. Thus, all these duties are of constitutional significance. (Para 39)

It is obvious that Parliament realised the need for inserting the fundamental duties as a part of the Indian Constitution and required every citizen of India to adhere to those duties. Thus, it will be difficult for any court to exclude from its consideration any of the abovementioned articles of the Constitution while examining the validity or otherwise of any restriction relating to the right to freedom of speech and expression available to a citizen under Article 19(1)(a) of the Constitution. The restriction placed on a fundamental right would have to be examined with reference to the concept of fundamental duties and non-interference with liberty of others. Therefore, a restriction on the right to assemble and raise protest has also to be examined on similar parameters and values. In other words, when you assert your right, you must respect the freedom of others. Besides imposition of a restriction by the State, non-interference with liberties of others is an essential condition for assertion of the right to freedom of speech and expression. (Para 40)

*D.C. Saxena v. Chief Justice of India*, (1996) 5 SCC 216, *relied on*

Every right has a corresponding duty. Part III of the Constitution of India although confers rights, duties and restrictions are inherent thereunder. Reasonable regulations have been found to be contained in the provisions of Part III of the Constitution of India, apart from Articles 19(2) to (4) and (6) of the Constitution. (Para 42)

*Union of India v. Naveen Jindal*, (2004) 2 SCC 510, *relied on*

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- a When there exists freedom of rights which are subject to reasonable restrictions, there are contemporaneous duties cast upon the citizens too. The duty to maintain law and order lies on the authority concerned and, thus, there is nothing unreasonable in making it the initial judge of the emergency. All this is coupled with a fundamental duty upon the citizens to obey such lawful orders as well as to extend their full cooperation in maintaining public order and tranquillity. (Para 52)

*Feiner v. New York*, 95 LEd 295 : 340 US 315 (1951), *relied on*

- b *Ramlila Maidan Incident, In re.* (2012) 5 SCC 125; *Ramlila Maidan Incident, In re.* (2012) 5 SCC 126, *referred to*  
*Pratap Singh v. State of Punjab*, AIR 1964 SC 72 : (1964) 4 SCR 733; *Destruction of Public and Private Properties, In re.* (2009) 5 SCC 212 : (2009) 2 SCC (Cri) 629 : (2009) 2 SCC (Civ) 451, *cited*

- c X. Constitution of India — Pts. III, IV and Art. 37 — Fundamental rights and directive principles — “Fundamental” — Meaning of — Different connotations in Pts. III and IV — Held (*per Swatanter Kumar, J.*), rights in Pt. III have been made fundamental in the sense that State’s power to abridge those rights have been curtailed — Directive principles have been treated fundamental in the sense that they are basic goals which State must strive to achieve — Words and Phrases — “Fundamental” — Interpretation of

- d *Held:*

- e The word “fundamental” as used in the expression “fundamental in the governance of the State” to describe the directive principles which have not legally been made enforceable. The word “fundamental” has been used in two different senses under the Constitution. The essential character of the fundamental rights is secured by limiting the legislative power and by providing that any transgression of the limitation would render the offending law *pretendo* void. The word “fundamental” in Article 37 also means basic or essential, but it is used in the normative sense of *seining*, before the State, goals which it should try to achieve. The significance of the fundamental principles stated in the directive principles has attained greater significance through judicial pronouncements. (Para 23)

- f Y. Constitution of India — Arts. 73, 162, 21 and 14 — Protection of life and property of citizens — State’s duty — Emphasised — Rule of Law (Paras 184 to 187)

- g Z. Constitution of India — Arts. 239-AA(3)(a) & (4) and Arts. 73 and 162 — Law and order management in Delhi — Delhi Police acting in coordination with Central Home Ministry — Held (*per Swatanter Kumar, J.*), nothing objectionable in it so long as police action is within framework of law — Government of National Capital Territory of Delhi Act, 1991 (1 of 1992) — S. 44 — Rule of Law (Paras 184 to 187)

*Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423; *Madhu Limaye v. Sub-Divisional Magistrate, Monghyr*, (1970) 3 SCC 746; *Amitabh Bachchan Corpn. Ltd. v. Mahila Jagran Manch*, (1997) 7 SCC 91; *R.K. Garg v. Supt. District Jail*, (1970) 3 SCC 227 : 1971 SCC (Cri) 45; *State of Karnataka v. Praveen Bhai Thogadia*, (2004) 4 SCC 684 : 2004 SCC (Cri) 1387, *cited*

- h [Ed.: Delhi Police comes under the administrative control of the Central Government and not the Government of NCT of Delhi.]

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ZA. Constitution of India — Arts. 32, 226 and Pt. III — Appropriate proceedings for enforcement of fundamental rights — *Suo motu* action by Supreme Court — Material relied upon — Media reports, photographs, CCTV camera footage of incident and police records — Practice and Procedure (Paras 125, 136 and 142 to 146) a

ZB. Penal Code, 1860 — Ss. 96, 97, 188 and 189 — Retaliatory action by public as a result of police crackdown — Criminal liability of attacking public — Use of tear gas by police, held, did not justify brickbattling by a section of public — Erring persons would be criminally liable — Criminal Procedure Code, 1973 — S. 144 — Constitution of India — Arts. 19(1)(a) & (b) and (2) & (3) and 21 — Rule of Law (Para 171) b

ZC. Criminal Procedure Code, 1973 — S. 144(1) — Prohibitory order — Scope and parameters for exercise of power — Emergent situation warranting quick remedial action — Power to be invoked to serve public purpose c

ZD. Words and Phrases — “Emergency” — Meaning explained — Exigent situation arising suddenly — Constitution of India — Art. 368 — Criminal Procedure Code, 1973, S. 144

*Held :*

*Per Swatanter Kumar, J.* d

Section 144 CrPC is intended to serve public purpose and protect public order. This power vested in the executive is to be invoked after the satisfaction of the authority that there is need for immediate prevention or that speedy remedy is desirable and directions as contemplated are necessary to protect the interest of others or to prevent danger to human life, health or safety or disturbance of public tranquillity or a riot or an affray. These features must coexist at a given point of time in order to enable the authority concerned to pass appropriate orders. Section 144 CrPC enumerates the principles and declares the situations where exercise of rights recognised by law, by one or few, may conflict with other rights of the public or tend to endanger public peace, tranquillity and/or harmony. The orders passed under Section 144 CrPC are attempted to serve larger public interest and purpose. Under the provisions of CrPC complete procedural mechanism is provided for examining the need and merits of an order passed under Section 144 CrPC. Section 144 CrPC is a power to be exercised by the specified authority to prevent disturbance of public order, tranquillity and harmony by taking immediate steps and when desirable, to take such preventive measures. (Paras 49, 50 and 52) e

The expression “emergency” even if understood in its common parlance would mean an exigent situation; a serious, unexpected, and potentially dangerous situation requiring immediate action. Such an emergent case must exist for the purpose of passing a protective or preventive order. This may be termed as an “emergency protective order” or an “emergency preventive order”. In either of these cases, the emergency must exist and that emergent situation must be reflected from the records which were before the authority concerned which passed the order under Section 144 CrPC. (Para 133) g

*Black's Law Dictionary*, 12th Edn.; *Concise Oxford English Dictionary*, 11th Edn., quoted h

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- a The entire basis of an action under this section is the "urgency of the situation" and the power therein is intended to be availed for preventing "disorder, obstruction and annoyance", with a view to secure the public weal by maintaining public peace and tranquillity. (Para 189)

*Gulam Abbas v. State of U.P.* (1982) 1 SCC 71 : 1982 SCC (Cri) 82, *relied on Per Chauthan, J.*

- b Section 144 CrPC deals with immediate prevention and speedy remedy. Before invoking such a provision, the statutory authority must be satisfied regarding the existence of the circumstances showing the necessity of an immediate action. The sine qua non for an order under Section 144 CrPC is urgency requiring an immediate and speedy intervention by passing of an order. The order must set out the material facts of the situation. Such a provision can be used only in grave circumstances for maintenance of public peace. The efficacy of the provision is to prevent some harmful occurrence immediately. The emergency must be sudden and the consequences sufficiently grave.

(Para 319)

- c ZF. Criminal Procedure Code, 1973 — Ss. 144(1) and 134 — Contents of prohibitory order — Precise statement of material facts and emergent circumstances warranting invocation of power under S. 144(1) — Order being a restriction on freedom of speech and to assemble peaceably, must be in writing and should set out grounds for imposing such order — Order to remain in force for a limited period of time only (*per Swatanter Kumar, J.*) — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21

*Held :*

- e The provisions of Section 144 CrPC provide for a complete mechanism to be followed by the Magistrate concerned and also specify the limitation of time till when such an order may remain in force. An order passed under Section 144 CrPC has the following characteristics: (1) It is an executive power vested in the officer so empowered; (2) There must exist sufficient ground for proceeding; (3) Immediate prevention or speedy remedy is desirable; and (4) An order, in writing, should be passed stating the material facts and be served the same upon the person concerned. An order under Section 144 CrPC being an order which has a direct consequence of placing a restriction on the right to freedom of speech and expression and right to assemble peaceably, should be an order in writing and based upon material facts of the case. This would be the requirement of law for more than one reason. Firstly, it is an order placing a restriction upon the fundamental rights of a citizen and, thus, may adversely affect the interests of the parties, and secondly, under the provisions of CrPC, such an order is revisable and is subject to judicial review. Therefore, it will be appropriate that it must be an order in writing, referring to the facts and stating the reasons for imposition of such restriction. (Paras 45, 56 and 57)

- g *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423; *Madhu Limaye v. Sub-Divisional Magistrate, Monghyr*, (1970) 3 SCC 746; *State of Bihar v. Kamla Kant Misra*, (1969) 3 SCC 337; *Jagrupa Kunari v. Chobey Narain Singh*, (1936) 37 Cri LJ 95 (Pat); *Himat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 227 : 1973 SCC (Cri) 280; *Railway Board v. Niranjana Singh*, (1969) 1 SCC 502; *State of Karnataka v. Praveen Bhai Thogadia*, (2004) 4 SCC 684 : 2004 SCC (Cri) 1387, *relied on*



**ZF. Criminal Procedure Code, 1973 — S. 144 — Social need to maintain peace and tranquillity — Temporary overriding of private rights — Permissibility (*per Swatanter Kumar, J.*) — Rule of Law — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21** a

*Held :*

The Constitution mandates and every Government is constitutionally committed to the idea of socialism, secularism and public tranquillity. The regulatory mechanism contemplated under different laws is intended to further the cause of this constitutional obligation. An order under Section 144 CrPC, though primarily empowers the executive authorities to pass prohibitory orders vis-à-vis a particular facet, but is intended to serve larger public interest. Restricted dimensions of the provisions are to serve the larger interest, which at the relevant time, has an imminent threat of being disturbed. The order can be passed when immediate prevention or speedy remedy is desirable. The legislative intention to preserve public peace and tranquillity without lapse of time, acting urgently, if warranted, giving thereby paramount importance to the social needs by even overriding temporarily, private rights, keeping in view the public interest, is patently inbuilt in the provisions under Section 144 CrPC. (Para 190) b

**ZG. Criminal Procedure Code, 1973 — S. 144 — Prohibitory order — Grounds for issuance of — Imminent threat and need for immediate preventive steps — Simultaneous existence of both parameters — Held, is necessary for invocation of S. 144 — Objective application of mind — Material on record, held, must disclose objective decision — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21** d

**ZH. Criminal Procedure Code, 1973 — S. 144 — Prohibitory order — Grounds for issuance of — Use of public place for purpose other than for which permission was obtained — Apprehended overcrowding of public place — Held, not relevant grounds for invoking S. 144 — On facts held, actual occupancy in Ramlila Maidan by peacefully agitating members of public was less than its capacity and therefore there was no justification to issue prohibitory order on this count — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21** e

*Held :*

*Per Swatanter Kumar, J.* f

Material facts, imminent threat and requirement for immediate preventive steps should exist simultaneously for passing any order under Section 144 CrPC. The mere change in the purpose or in the number of persons to be gathered at the Ramlila Maidan simpliciter could hardly be the cause of such a grave concern for the authorities to pass the orders late in the night. In the standing order issued by the police itself, it has been clarified that wherever the gathering is more than 50,000, the same may not be permitted at the Ramlila Maidan but they should be offered Burari Ground as an alternative. This itself shows that the attempt on the part of the authorities concerned should be to permit such public gathering by allotting them alternative site and not to cancel such meetings. This, however, does not seem to further the case of the State at all inasmuch as when the order was passed and the police came to the Ramlila Maidan to serve the said order, not even 15,000 to 20,000 people were stated to be present in the shamiana/tent. In these circumstances, it appears it was not necessary for the executive g  
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- authorities and the police to pass orders under Section 144 CrPC and withdraw the permissions. The matter could be resolved by mutual deliberation and intervention by the appropriate authorities. (Para 218)
- a 21. Criminal Procedure Code, 1973 — S. 144 — Threat perception — Relevance of, for issuance of prohibitory order — Held (*per Swatanter Kumar, J.*), threat perception must be real and based on objective assessment of situation — Mere possibility of a danger is not enough to invoke S. 144 — Proportionality in prohibitory order — Held, order must be least intrusive and period of its operation should not be longer than necessary — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21
- b Held :
- The requirement of existence of sufficient ground and need for immediate prevention or speedy remedy is of prime significance. The perception of the officer recording the desired/contemplated satisfaction has to be reasonable, least invasive and bona fide. The restraint has to be reasonable and must be minimal.
- c Such restraint should not be allowed to exceed the constraints of the particular situation either in nature or in duration. The most onerous duty that is cast upon the empowered officer by the legislature is that the perception of threat to public peace and tranquillity should be real and not quandary, imaginary or a mere likely possibility. Apprehension of danger is what can inevitably be gathered only from the circumstances of a given case. (Paras 58 and 59)
- d The activities which, though unintended have a tendency to create disorder or disturbance of public peace by resorting to violence, should invite the appropriate authority to pass orders taking preventive measures. The intent or the expected threat should be imminent. Some element of certainty, therefore, should be traceable in the material facts recorded and the necessity for taking such preventive measures. There has to be an objective application of mind to ensure that the constitutional rights are not defeated by subjective and arbitrary exercise of power. Threat perception is one of the most relevant considerations and may differ as per the perspective of different parties. (Paras 221 and 222)
- e Existence of sufficient ground is the sine qua non for invoking the power vested in the executive under Section 144 CrPC. It is a very onerous duty that is cast upon the empowered officer by the legislature. The perception of threat should be real and not imaginary or a mere likely possibility. The test laid down in this section is not that of "mere likelihood or tendency". The legislature, in its wisdom, has empowered an officer of the executive to discharge this duty with great caution, as the power extends to placing a restriction and in certain situations, even a prohibition, on the exercise of the fundamental right to freedom of speech and expression. In case of a mere apprehension, without any material facts to indicate that the apprehension is imminent and genuine, it may not be proper for the authorities to place such a restriction upon the rights of the citizen. (Para 225)
- f The authorities are expected to seriously cogitate over the matter in its entirety keeping the common welfare in mind. The police have not placed on record any document or even affidavits to show such sudden change of circumstances, compelling the authorities to take the action that they took. Denial of a right to hold such meeting has to be under exceptional circumstances and strictly with the object of preventing public tranquillity and public order from being disturbed. (Para 228)
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ZJ. Criminal Procedure Code, 1973 — S. 144 — Procedural safeguards to be observed by police — Public announcement and banner display of promulgation of prohibitory order — Declaration of the assembly as unlawful and prior warning on public address system before use of any kind of force — Videography of event — Safeguards not followed in Ramlila Maidan incident of 4-6-2011 — Tear gas also used improperly in an enclosed space — Police action apparently suggested highhandedness and therefore declared unconstitutional — Delhi Police Standing Orders — Standing Orders 309 and 152 — Punjab Police Rules, 1934 (applicable to Delhi) — R. 14.56(1)(a) — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21 (Paras 162 to 173) a

ZK. Criminal Procedure Code, 1973 — S. 144 — Time to be allowed for obeying prohibitory order — Held (*per Swatanter Kumar, J.*), such time period is to be decided by competent authority depending on situation emerging in a given case — Normally reasonable time to be allowed but in emergent situation, order may be enforced immediately — However, undue haste to be avoided as it may make situation worse than sought to be prevented — Ramlila Maidan incident of 4-6-2011 — Sleeping public, held, ought to have been allowed to leave by morning instead of asking them to leave immediately at night — Prohibitory order, further held, also ought to have been announced by means of public address system — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21 (Paras 229 to 233) c

ZL. Criminal Procedure Code, 1973 — Ss. 144(1), 129, 130 and 195(1)(a) — Prohibitory order — Effect on assembly against which such order is passed — Disagreeing opinions expressed — *Per Swatanter Kumar, J.*, assembly becomes unlawful and assembled persons must immediately comply with order failing which force may be used against them — *Per Chauhan, J. (disagreeing on this point)*, disobedience becomes punishable only when it causes or tends to cause obstruction, annoyance or injury in terms of S. 188 IPC — Follow-up action if prohibitory order defied — Complaint to be filed under S. 195(1)(a) before competent Magistrate — Penal Code, 1860 — Ss. 188 and 187 — Constitution of India, Arts. 19(1)(a) & (b) and (2) & (3) and 21 e

ZM. Criminal Procedure Code, 1973 — S. 144 — Duty to obey prohibitory order — Consequences of failure to obey — Held (*per Swatanter Kumar, J.*), every defaulting person, by virtue of S. 149 IPC, becomes vicariously liable for illegal acts committed by other members of assembly — Penal Code, 1860, Ss. 187, 188 and 149 f

ZN. Tort Law — Contributory Negligence — Application of concept to organisers of public meetings — Injuries and death taking place as a result of organisers' failure to obey order passed under law — Liability for — Held (*per curiam*), organisers become negligent and therefore become tortiously liable when statutory order is defied and consequently participants of meeting suffer due to chaos resulting therefrom — Responsibility arises both under duty of care and fundamental duties prescribed in Art. 51-A — Ramlila Maidan incident of 4-6-2011 — Baba Ramdev, chief organiser, held, was under legal and moral duty to prevent mishap by complying with prohibitory order under S. 144 CrPC, 1973 even g

- a if order was strictly not in conformity with requirements of S. 144 — Liability therefore fastened on organisers of yoga camp as well as police authorities — Constitution of India — Arts. 19(1)(a) & (b) and (2) & (3), 21 and Art. 51-A — Legal Maxims — *Actio quaelibet it sua via* (every action is to follow its prescribed course) — *Injuria non excusat injuriam* — Applied — Penal Code, 1860, Ss. 187 and 188

- b ZO. Tort Law — Negligence — Concept — Absence of care warranted in a given situation resulting in injury to other person — Kinds of negligence — Composite or contributory (*per Sivalanter Kumar, J.*)

- c ZP. Tort Law — Negligence — Contributory negligence — Factors giving rise to liability — Whether one party could avoid consequences of other's negligence by taking reasonable care — Application of principle to public gatherings — Liability for injuries suffered in a public meeting — Rule of identification for determining who was responsible — Agony-of-moment theory — Held (*per Sivalanter Kumar, J.*), court can determine kind of behaviour expected of a party in particular circumstances and how far such party contributed to injuries suffered by public — Words and Phrases — "Contributory negligence"

Held:

*Per Sivalanter Kumar, J.*

- d Once an order under Section 144 CrPC is passed, it is expected of all concerned to implement the said order unless it has been rescinded or modified by a forum of competent jurisdiction. Its enforcement has legal consequences. One of such consequences would be the dispersal of an unlawful assembly and, if necessitated, by using permissible force. An assembly which might have lawfully assembled would be termed as an "unlawful assembly" upon the passing and implementation of such a preventive order. The empowered officer is also vested with adequate powers to direct the dispersal of such assembly. He may even take the assistance of officers concerned and armed forces for the purposes of dispersing such an assembly. The said officer has even been vested with the powers of arresting and confining the persons and, if necessary, punishing them in accordance with law in terms of Section 129 CrPC. An order under Section 144 CrPC would have an application to an "actual" unlawful assembly as well as a "potential" unlawful assembly. This is precisely the scope of application and enforcement of an order passed under Section 144 CrPC.

(Para 60)

*Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423, *relied on*

- g Once an order under Section 144 CrPC is passed by the competent authority and such order directs certain acts to be done or directs the abstention from doing certain acts and such order is in force, any assembly, which initially might have been a lawful assembly, would become an unlawful assembly and the people so assembled would be required to disperse in furtherance to such order. A person can not only be held responsible for his own act, but, in light of Section 149 IPC, if the offence is committed by any member of the unlawful assembly in prosecution of a common object of that assembly, every member of such assembly would become member of the unlawful assembly. Obedience of lawful orders is the duty of every citizen. Every action is to follow its prescribed course

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in law *actio quaelibet it sua via*. The course prescribed in law has to culminate to its final stage in accordance with law. In that process there might be either a clear disobedience or a contributory disobedience. In either way, it may tantamount to being negligent. Thus, the principle of contributory negligence can be applied against parties to an action or even a non-party. The rule of identification would be applied in cases where a situation of the present kind arises. The Court will have to see the fault of the party and the effective cause of the ensuing injury. Also it has to be seen that in the "agony of the moment", would the situation have been different and safe, had the people concerned acted differently and as to who was majorly responsible for creation of such a dilemma. Under the English law, it has been accepted that once a statute has enjoined a pattern of behaviour as a duty, no individual can absolve another from having to obey it. Thus, as a matter of public policy, *volenti* cannot erase the duty or breach of it.

(Paras 270 to 272)

*Clerk and Lindsell on Torts*, 20th Edn., p. 246, *quoted*

There is no statutory definition of contributory negligence. The concerns of contributory negligence are now too firmly established to be disregarded, but it has to be understood and applied properly. "Negligence" materially contributes to injury or is regarded as expressing something which is a direct cause of the accident.

(Para 273)

*Nance v. British Columbia Electric Railway Co. Ltd.*, 1951 AC 601 : (1951) 2 All ER 448 (PC), *relied on*

The individual guilty of contributory negligence may be the employee or agent of the claimant, so as to render the claimant vicariously responsible for what he did. There could be cases of negligence between spectators and participants in sporting activities. However, in such matters, negligence itself has to be established. In cases of "contributory negligence", it may not always be necessary to show that the claimant is in breach of some duty, but the duty to act carefully, usually arises and the liability in an action could arise. These are some of the principles relating to the award of compensation in cases of contributory negligence and in determining the liability and identifying the defaulter. Even if these principles are not applicable *stricto sensu* to the cases of the present kind, the applied principles of contributory negligence akin to these principles can be applied more effectively on the strength of the provisions of Section 149 IPC.

(Para 274)

*Charlesworth and Percy on Negligence*, 11th Edn., pp. 195 and 206, *relied on*

Negligence could be composite or contributory. "Negligence" does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. "Negligence" is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. Normally, the crucial question on which such a liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. The principle stated therein would be applicable to a large extent to the cases involving the principles of contributory negligence as well.

(Para 275)

*Municipal Corpn. of Greater Bombay v. Laxman Iyer*, (2003) 8 SCC 731 : 2004 SCC (Cri) 252; *MCD v. Uphar Tragedy Victims Assn.*, (2011) 14 SCC 481, *relied on*

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- Whenever an order is passed which remains unchallenged before the court of competent jurisdiction, then its execution is the obvious consequence in law. For its execution, all concerned are expected to permit implementation of such orders and, in fact, are under a legal obligation to fully cooperate in the enforcement of lawful orders. Article 51-A requires the citizens of India to abide by the Constitution and to uphold the sovereignty and integrity of India. Article 51-A(i) requires a citizen to safeguard public property and to abjure violence. An order passed under Section 144 CrPC is a restriction on enjoyment of fundamental rights. It has been held to be a reasonable restriction. Once an order is passed under Section 144 CrPC within the framework and in accordance with the requirements of the said section, then it is a valid order which has to be respected by all concerned. Its enforcement is the natural consequence. (Paras 276 and 278)

- When an order was passed by the authorities competent to pass such an order, it was expected of all concerned to respect the order lawfully passed and to ensure that the situation at the site was not converted into a tragedy. All were expected to cooperate in the larger interest of the public. The police was concerned with the problem of law and order while Respondent 4 and Baba Ramdev certainly should have been concerned about the welfare of their followers and the large gathering present at the Ramlila Maidan. Thus, to that extent, the police and Respondent 4 ought to have acted in tandem and ensured that no damage to the person or property should take place, which unfortunately did not happen. (Para 282)

- Keeping in view the stature and respect that Baba Ramdev enjoyed with his followers, he ought to have exercised the moral authority of his office in the welfare of the people present. There exists a clear constitutional duty, legal liability and moral responsibility to ensure due implementation of lawful orders and to maintain the basic rule of law. It would have served the greater public purpose and even the purpose of the protests for which the rally was being held, if Baba Ramdev had requested his followers to instantaneously leave the Ramlila Maidan peacefully or had assured the authorities that the morning yoga programme or protest programme would be cancelled and the people would be requested to leave for their respective places. Absence of performance of this duty and the gesture of Baba Ramdev led to an avoidable lacerating episode. (Para 283)

- Even if the Court takes the view that there was undue haste, adumance and negligence on the part of the police authorities, then also it cannot escape to mention that to this negligence, there is a contribution by Respondent 4 as well. The role of Baba Ramdev at that crucial juncture could have turned the tide and probably brought a peaceful end rather than the heart rending end of injuries and unfortunate death. Even if it is assumed that the action of the police was wrong in law, it gave no right to others to commit any offence *injuria non excusat injuriam*. (Para 284)

- Every law-abiding citizen should respect the law and must stand in conformity with the rule, be as high an individual may be. Violation of orders has been made punitive under the provisions of Section 188 IPC, but still in other allied proceedings, it would result in fastening the liability on all contributory partners, may be vicariously, but the liability certainly would extend to all the defaulting parties. For these reasons, a view has to be taken that in the circumstances of the case, Baba Ramdev and the office-bearers of Respondent 4 have contributed to the negligence leading to the occurrence in question and are vicariously liable for such action. (Para 285)

*Per Chauhan, J.*

The disobedience of the prohibitory order becomes punishable under Section 188 IPC only "if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed" or "if such disobedience causes or tends to cause damage to human life, health or safety, or causes or tends to cause riot or affray". Disobedience of an order by public servant lawfully empowered will not be an offence unless such disobedience leads to enumerated consequences stated under the provision of Section 188 IPC. More so, a violation of the prohibitory order cannot be taken cognizance of by the Magistrate who passed it. He has to prefer a complaint about it as provided under Section 195(1)(a) CrPC. A complaint is not maintainable in the absence of allegation of danger to life, health or safety or of riot or affray. (Para 320) a

It cannot be presumed that such an assembly is necessarily illegal and even if it was, the individuals were all asleep who were taken by surprise altogether for a simultaneous implementation and action under Section 144 CrPC without being preceded by an announcement or even otherwise, giving no time in a reasonable way to the assembly to disperse from the Ramlila Ground. To the contrary, the sleep of this huge crowd was immodestly and brutally outraged and it was dispersed by force making them flee hither and thither, which by such precipitate action, caused a mayhem that was reflected in the media. (Para 326) b

ZQ. Criminal Procedure Code, 1973 — S. 144 — Prohibitory order — Contents of — Order not disclosing exceptional circumstances warranting invocation of S. 144 at midnight and also not giving any specific direction to organisers of public meeting — Held (*per Swatanter Kumar, J.*), bad in law (Paras 210 and 212) c

ZR. Criminal Procedure Code, 1973 — S. 144 — Constitutional validity — Power to issue prohibitory order under S. 144, held (*per Swatanter Kumar, J.*), is conferred in the interest of public tranquillity and is therefore constitutional (Paras 38 and 49) d

ZS. Words and Phrases — "Law and order" — Meaning and content — Held (*per Swatanter Kumar, J.*), expression is comprehensive enough to take in its fold "public order", "public peace", "public tranquillity" and "orderliness" (Paras 37 and 49) e

ZT. Words and Phrases — "Public order" — Held (*per Swatanter Kumar, J.*), is different from orderliness in a local area — Breach of peace confined to a particular area, may not necessarily lead to public disorder — However, where a disturbance affects community or public at large, it may give rise to public disorder — Disturbance of public peace, when aggravated, may become a public order problem (Paras 37 and 49) f

*Ramesh Thuppar v. State of Madras*, AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740 : 1966 Cri LJ 608; *State of Karnataka v. Praveen Bhui Bhogadia*, (2004) 4 SCC 684 : 2004 SCC (Cri) 1387, relied on g

ZU. Legal Maxims — *Qui non prohibet quod prohibere potest, usentire videtur* (he who does not prohibit when he is able to prohibit assents to it) — Applied (Para 227) h

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Advocates who appeared in this case :

- a R.F. Nariman, Solicitor General, P.P. Malhotra, Additional Solicitor General, Dr Rajeev Dhawan (Amicus Curiae), Ram Jethmalani, Harish Salve and P.H. Parekh, Senior Advocates [Udita Singh, L.R. Singh, Shubhramshu Pedhi, Ms Anil Katiyar, Ms Lata Krishnanurti, Balajji Subramanian, Ms Manu Sharma, Karan Kalia, Pranav Dishes, Sanjay Jain, Vikas Garg, B.K. Prasad, Siddhartha Dave, Shailender Sharma, S.N. Terdal, D.P. Mohanty, Ms Subhasree Chatterjee, Anand Shankar Jha, Ekansh Misra (for M/s Parekh & Co.), Ms Kamini Jaiswal, Ms Shomila Bakshi, Abhimanyu Shrestha and Ms Kumud L. Das, Advocates] for the appearing parties.
- b *Chronological list of cases cited* *on page(s)*
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28	SUPREME COURT CASES	(2012) 5 SCC
32.	(1981) 1 SCC 608 : 1981 SCC (Cri) 212, <i>Francis Coralie Mullin v. UT of Delhi</i>	119a
33.	(1981) 1 SCC 420 : 1981 SCC (Cri) 169, <i>Malak Singh v. State of P&amp;H</i>	120a
34.	(1979) 2 SCC 409 : 1979 SCC (Tax) 144, <i>Motilal Padanipat Sugar Mills Co. Ltd. v. State of U.P.</i>	118e
35.	(1978) 3 SCC 544 : 1978 SCC (Cri) 468, <i>M.H. Hoskot v. State of Maharashtra</i>	33a-b
36.	(1978) 1 SCC 248, <i>Maneka Gandhi v. Union of India</i>	32g-h
37.	(1975) 2 SCC 148 : 1975 SCC (Cri) 468, <i>Gobiad v. State of M.P.</i>	119b
38.	(1973) 1 SCC 227 : 1973 SCC (Cri) 280, <i>Himad Lal K. Shah v. Commr. of Police</i>	42c-d, 97a, 103b, 103g-h
39.	(1971) 1 SCC 85, <i>Madhav Rao Jivaji Rao Scindia v. Union of India</i>	118d
40.	(1970) 3 SCC 746, <i>Madhu Limaye v. Sub-Divisional Magistrate, Monghyr</i>	40d-e, 100f, 101a, 101a-b
41.	(1970) 3 SCC 227 : 1971 SCC (Cri) 45, <i>R.K. Garg v. Supt., District Jail</i>	100f
42.	(1969) 3 SCC 337, <i>State of Bihar v. Kamla Kant Misra</i>	41a
43.	(1969) 1 SCC 502 : (1969) 3 SCR 548, <i>Railway Board v. Niranjana Singh</i>	42e-f
44.	AIR 1966 SC 740 : 1966 Cri LJ 608, <i>Ram Manohar Lohia v. State of Bihar</i>	37d-e, 43b-c
45.	AIR 1964 SC 72 : (1964) 4 SCR 733, <i>Pratap Singh v. State of Punjab</i>	54d
46.	AIR 1963 SC 1295 : (1963) 2 Cri LJ 329, <i>Khanak Singh v. State of U.P.</i>	119b, 119b-c
47.	AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423, <i>Babulal Parate v. State of Maharashtra</i>	31a, 40b, 42a-b, 46c, 81g-h, 100e-f, 101a-b
48.	AIR 1959 SC 1383, <i>State of Saurashtra v. Memoa Haji Ismail Haji Valimohammed</i>	118e
49.	AIR 1954 SC 92, <i>State of W.B. v. Subodh Gopal Bose</i>	32d
50.	AIR 1952 SC 196 : 1952 Cri LJ 966, <i>State of Madras v. V.G. Row</i>	36c
51.	1951 AC 601 : (1951) 2 All ER 448 (PC), <i>Nance v. British Columbia Electric Railway Co. Ltd.</i>	106f-g
52.	AIR 1951 SC 118, <i>Chhotamanrao v. State of M.P.</i>	36e
53.	95 L Ed 295 : 340 US 315 (1951), <i>Friar v. New York</i>	44c
54.	95 L Ed 267, at 276 : 340 US 268, at 282 (1951), <i>Niemotko v. Maryland</i>	29e
55.	AIR 1950 SC 124 : (1950) 51 Cri LJ 1514, <i>Ramesh Thappar v. State of Madras</i>	37c-d, 45a-b
56.	93 L Ed 1782 : 338 US 25 (1949), <i>Wolf v. Colorado</i>	119f-g
57.	(1936) 37 Cri LJ 95 (Pat), <i>Jagrupa Kumari v. Chohey Narain Singh</i>	41c-d
58.	63 L Ed 470 : 249 US 47 (1919), <i>Schenck v. United States</i>	29c-d, 30b-c, 30f-g

The Judgments<sup>†</sup> of the Court were delivered by

SWATANTER KUMAR, J.—At the very outset, I would prefer to examine the principles of law that can render assistance in weighing the merit or otherwise of the contentious disputations asserted before the Court by the parties in the present suo motu petition. Besides restating the law governing Articles 19(1)(a) and 19(1)(b) of the Constitution of India and the parallel restrictions contemplated under Articles 19(2) and 19(3) respectively, I would also gauge the dimensions of legal provisions in relation to the exercise of jurisdiction by the empowered officer in passing an order under Section 144 of the Code of Criminal Procedure, 1973 (for short “CrPC”).

† Chaudhan, J. delivered a concurring judgment.

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2. It appears justified here to mention the First Amendment to the United States (US) Constitution, a bell-wether in the pursuit of expanding the horizon of civil liberties. This Amendment provides for the freedom of speech of press in the American Bill of Rights. This Amendment added new dimensions to this right to freedom and purportedly, without any limitations. The expressions used in wording the First Amendment have a wide magnitude and are capable of liberal construction. It reads as under:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The effect of use of these expressions, in particular, was that the freedom of speech of press was considered absolute and free from any restrictions whatsoever.

3. Shortly thereafter, as a result of widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of "clear and present danger". However, application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of "balancing of interests". The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Frankfurter, J. often applied the abovementioned balancing formula and concluded that "while the court has emphasised the importance of 'free speech', it has recognised that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations."

4. The "balancing of interests" approach is basically derived from Roscoe Pound's theories of social engineering. Pound had insisted that his structure of public, social and individual interests are all, in fact, individual interests looked at from different points of view for the purpose of clarity. Therefore, in order to make the system work properly, it is essential that when interests are balanced, all claims must be translated into the same level and carefully labelled. Thus, a social interest may not be balanced against individual interest, but only against another social interest. The author points out that throughout the heyday of the "clear and present danger" and "preferred position" doctrines, the language of balancing, weighing or accommodating interests was employed as an integral part of the libertarian position. (*Freedom of Speech: The Supreme Court and Judicial Review*, by Martin Shapiro, 1966.)

\* Ed.: The "clear and present danger" test was laid down by Holmes, J. in *Schenck v. United States*, 63 L. Ed 470 : 249 US 47 (1919) for deciding whether a restriction on free speech was constitutionally valid.

\*\* Ed.: See in this regard observations of Frankfurter, J. in *Niemtoko v. Maryland*, 95 L. Ed 267, at 276 : 340 US 268, at 282 (1951).

5. Even in the United States there is a recurring debate in modern First Amendment jurisprudence as to whether First Amendment rights are "absolute" in the sense that the Government may not abridge them at all or whether the First Amendment requires the "balancing of competing interests" in the sense that free speech values and the Government's competing justification must be isolated and weighted in each case. Although the First Amendment to the American Constitution provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of the constitutional Government to survive. If it is to survive, it must have power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts. Freedom of speech, thus, does not comprehend the right to speak on any subject at any time.

6. In *Schenck v. United States*<sup>1</sup> the Court held: (L Ed pp. 473-74)

"... the character of every act depends upon the circumstances in which it is done. ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre, and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

[*Constitution of India* (2nd Edn.), Vol. I by Dr L.M. Singhvi.]

7. In contradistinction to the above approach of the US Supreme Court, the Indian Constitution spells out the right to freedom of speech and expression under Article 19(1)(a). It also provides the right to assemble peacefully and without arms to every citizen of the country under Article 19(1)(b). However, these rights are not free from any restrictions and are not absolute in their terms and application. Articles 19(2) and 19(3), respectively, control the freedoms available to a citizen. Article 19(2) empowers the State to impose reasonable restrictions on exercise of the right to freedom of speech and expression in the interest of the factors stated in the said clause. Similarly, Article 19(3) enables the State to make any law imposing reasonable restrictions on the exercise of the right conferred, again in the interest of the factors stated therein.

8. In face of this constitutional mandate, the American doctrine adumbrated in *Schenck case*<sup>1</sup> cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the abovenoticed restrictions. Thus, the position under our Constitution is different.

9. In *Constitutional Law of India* by H.M. Seervai (4th Edn.), Vol. I, the author has noticed that the provisions of the two Constitutions as to freedom of speech and expression are essentially different. The difference being accentuated by the provisions of the Indian Constitution for preventive detention which have no counterpart in the US Constitution. Reasonable

<sup>1</sup> 63 L Ed 470; 249 US 47 (1919)

restriction contemplated under the Indian Constitution brings the matter in the domain of the court as the question of reasonableness is a question

a primarily for the court to decide. (*Babulal Parate v. State of Maharashtra*<sup>2</sup>)

10. The fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. For instance, the right to freedom of speech and expression is not violated by a

b law which requires that the name of the printer and publisher and the place of printing and publication should be printed legibly on every book or paper.

11. Thus, there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws. It is significant to note that the freedom of speech is the bulwark of a democratic Government. This freedom is essential for proper functioning of the

c democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural

d right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press.

12. In order to effectively consider the rival contentions raised and in the backdrop of the factual matrix, it will be of some concern for this Court to examine the constitutional scheme and the historical background of the

e relevant articles relating to the right to freedom of speech and expression in India. The Framers of our Constitution, in unambiguous terms, granted the right to freedom of speech and expression and the right to assemble peaceably and without arms. This gave to the citizens of this country a very valuable right, which is the essence of any democratic system. There could be no expression without these rights. Liberty of thought enables liberty of

f expression. Belief occupies a place higher than thought and expression. Belief of people rests on liberty of thought and expression. Placed as the three angles of a triangle, thought and expression would occupy the two corner angles on the baseline while belief would have to be placed at the upper angle. Attainment of the preambled liberties is eternally connected to the liberty of expression. (*Preamble: The Spirit and Backbone of the*

g *Constitution of India*, by Justice R.C. Lahoti.)

13. These valuable fundamental rights are subject to restrictions contemplated under Articles 19(2) and 19(3), respectively. Article 19(1) was subjected to just one amendment, by the Constitution (Forty-fourth Amendment) Act, 1978, vide which Article 19(1)(f) was repealed. Since

h Parliament felt the need of amending Article 19(2) of the Constitution, it was

<sup>2</sup> AIR 1961 SC 884 : (1961) 2 Cr LJ 16 : (1961) 3 SCR 423

substituted by the Constitution (First Amendment) Act, 1951 with retrospective effect. Article 19(2) was subjected to another amendment and vide the Constitution (Sixteenth Amendment) Act, 1963, the expression "the sovereignty and integrity of India" was added. The pre-amendment article had empowered the State to make laws imposing reasonable restrictions in exercise of the rights conferred under Article 19(1)(a) in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence. To introduce a more definite dimension with regard to the sovereignty and integrity of India, this amendment was made. It provided the right spectrum in relation to which the State could enact a law to place reasonable restrictions upon the freedom of speech and expression.

14. This shows that the State has a duty to protect itself against certain unlawful actions and, therefore, may enact laws which would ensure such protection. The right that springs from Article 19(1)(a) is not absolute and unchecked. There cannot be any liberty absolute in nature and uncontrolled in operation so as to confer a right wholly free from any restraint. Had there been no restraint, the rights and freedoms may become synonymous with anarchy and disorder. (*State of W.B. v. Subodh Gopal Bose*<sup>3</sup>)

15. I consider it appropriate to examine the term "liberty", which is subject to reasonable restrictions, with reference to the other constitutional rights. Article 21 is the foundation of the constitutional scheme. It grants to every person the right to life and personal liberty. This article prescribes a negative mandate that:

"21. *Protection of life and personal liberty.*—No person shall be deprived of his life or personal liberty except according to procedure established by law."

The procedure established by law for deprivation of rights conferred by this article must be fair, just and reasonable. The rules of justice and fair play require that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness, thereby vitiating the law which prescribed that procedure and, consequently, the action taken thereunder.

16. Any action taken by a public authority which is entrusted with the statutory power has, therefore, to be tested by the application of two standards—first, the action must be within the scope of the authority conferred by law and, second, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it means that the procedure established under which that action is taken is itself unreasonable. The concept of "procedure established by law" changed its character after the judgment of this Court in *Maneka Gandhi v. Union of India*<sup>4</sup>, where this Court took the view as under: (SCC p. 284, para 7)

"7. ... The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness

<sup>3</sup> AIR 1954 SC 92

<sup>4</sup> (1978) 1 SCC 218 : AIR 1978 SC 597

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a pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

This was also noted in *M.H. Hoskot v. State of Maharashtra*<sup>5</sup> where this Court took the following view: (SCC p. 551, para 10)

b "10. ... 'Procedure established by law' are words of deep meaning for all lovers of liberty and judicial sentinels."

17. What emerges from the above principles, which has also been followed in a catena of judgments of this Court, is that the law itself has to be reasonable and furthermore, the action under that law has to be in accordance with the law so established. Non-observance of either of this can vitiate the action, but if the former is invalid, the latter cannot withstand.

c 18. Article 13 is a protective provision and an index of the importance and preference that the Framers of the Constitution gave to Part III. In terms of Article 13(1), the laws in force before the commencement of the Constitution, insofar as they were inconsistent with the provisions of that Part were, to the extent of such inconsistency, void. It also fettered the right of the State in making laws. The State is not to make any law which takes away or abridges the rights conferred by this Part and if such law is made then to the extent of conflict, it would be void. In other words, except for the limitations stated in the articles contained in Part III itself and Article 13(4) of the Constitution, this article is the reservoir of the fundamental protections available to any person/citizen.

e 19. While these are the guaranteed fundamental rights, Article 38, under the directive principles of State policy contained in Part IV of the Constitution, places a constitutional obligation upon the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice—social, economic and political—shall inform all the institutions of the national life. Article 37 makes the directive principles of State policy fundamental in the governance of the country and provides that it shall be the duty of the State to apply these principles in making laws.

g 20. With the development of law, even certain matters covered under this Part relating to directive principles have been uplifted to the status of fundamental rights, for instance, the right to education. Though this right forms part of the directive principles of State policy, compulsory and primary education has been treated as a part of Article 21 of the Constitution of India by the courts, which consequently led to the enactment of the Right of Children to Free and Compulsory Education Act, 2009.

h 21. Article 51-A deals with the fundamental duties of the citizens. It, inter alia, postulates that it shall be the duty of every citizen of India to abide

by the Constitution, to promote harmony and the spirit of common brotherhood, to safeguard public property and to abjure violence.

22. Thus, a common thread runs through Parts III, IV and IV-A of the Constitution of India. One Part enumerates the fundamental rights, the second declares the fundamental principles of governance and the third lays down the fundamental duties of the citizens. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts.

23. It is necessary to be clear about the meaning of the word "fundamental" as used in the expression "fundamental in the governance of the State" to describe the directive principles which have not legally been made enforceable. Thus, the word "fundamental" has been used in two different senses under our Constitution. The essential character of the fundamental rights is secured by limiting the legislative power and by providing that any transgression of the limitation would render the offending law *pretendo* void. The word "fundamental" in Article 37 also means basic or essential, but it is used in the normative sense of setting, before the State, goals which it should try to achieve. As already noticed, the significance of the fundamental principles stated in the directive principles has attained greater significance through judicial pronouncements.

24. As difficult as it is to anticipate the right to any freedom or liberty without any reasonable restriction, equally difficult it is to imagine the existence of a right not coupled with a duty. The duty may be a direct or indirect consequence of a fair assertion of the right. Part III of the Constitution of India although confers rights, still duties and restrictions are inherent thereunder. These rights are basic in nature and are recognised and guaranteed as natural rights, inherent in the status of a citizen of a free country, but are not absolute in nature and uncontrolled in operation. Each one of these rights is to be controlled, curtailed and regulated, to a certain extent, by laws made by Parliament or the State Legislature.

25. In spite of there being a general presumption in favour of the constitutionality of a legislation under challenge alleging violation of the right to freedom guaranteed by clause (1) of Article 19 of the Constitution, on a *prima facie* case of such violation being made out, the onus shifts upon the State to show that the legislation comes within the permissible restrictions set out in clauses (2) to (6) of Article 19 and that the particular restriction is reasonable. It is for the State to place on record appropriate material justifying the restriction and its reasonability. Reasonability of restriction is a matter which squarely falls within the power of judicial review of the courts. Such limitations, therefore, indicate two purposes; one that the freedom is not absolute and is subject to regulatory measures and the second that there is also a limitation on the power of the legislature to restrict these freedoms. The legislature has to exercise these powers within the ambit of Article 19(2) of the Constitution.

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26. Further, there is a direct and not merely implied responsibility upon the Government to function openly and in public interest. The right to information itself emerges from the right to freedom of speech and expression. Unlike an individual, the State owns a multi-dimensional responsibility. It has to maintain and ensure security of the State as well as the social and public order. It has to give utmost regard to the right to freedom of speech and expression which a citizen or a group of citizens may assert. The State also has a duty to provide security and protection to the persons who wish to attend such assembly at the invitation of the person who is exercising his right to freedom of speech or otherwise.

27. In *S. Rangarajan v. P. Jagjivan Ram*<sup>6</sup> this Court noticed as under: (SCC pp. 595-96, para 45)

- "45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a power keg'."

28. Where the court applies the test of "proximate and direct nexus with the expression", the court also has to keep in mind that the restriction should be founded on the principle of least invasiveness i.e. the restriction should be imposed in a manner and to the extent which is unavoidable in a given situation. The court would also take into consideration whether the anticipated event would or would not be intrinsically dangerous to public interest.

29. Now, I would examine the various tests that have been applied over the period of time to examine the validity and/or reasonability of the restrictions imposed upon the rights.

*Upon the rights enshrined in the Constitution*

30. No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the following tests emerge:

- (a) The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to back it up.



(b) Each restriction must be reasonable.

(c) A restriction must be related to the purpose mentioned in Article 19(2).

The questions before the Court, thus, are whether the restriction imposed was reasonable and whether the purported purpose of the same squarely fell within the relevant clauses discussed above.

31. The legislative determination of what restriction to impose on a freedom is final and conclusive, as it is not open to judicial review. The judgments of this Court have been consistent in taking the view that it is difficult to define or explain the word "reasonable" with any precision. It will always be dependent on the facts of a given case with reference to the law which has been enacted to create a restriction on the right. It is neither possible nor advisable to state any abstract standard or general pattern of reasonableness as applicable uniformly to all cases. This Court in *State of Madras v. V.G. Row*<sup>7</sup> held: (AIR p. 200, para 15)

"15. ... It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases."

32. For adjudging the reasonableness of a restriction, factors such as the duration and extent of the restrictions, the circumstances under which and the manner in which that imposition has been authorised, the nature of the right infringed, the underlining purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, amongst others, enter into the judicial verdict. (See *Chintamanrao v. State of M.P.*<sup>8</sup>)

33. The courts must bear a clear distinction in mind with regard to "restriction" and "prohibition". They are expressions which cannot be used interchangeably as they have different connotations and consequences in law. Wherever a "prohibition" is imposed, besides satisfying all the tests of a reasonable "restriction", it must also satisfy the requirement that any lesser alternative would be inadequate. Furthermore, whether a restriction, in effect, amounts to a total prohibition or not, is a question of fact which has to be determined with regard to facts and circumstances of each case.

34. This Court in *State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamal*<sup>9</sup> held as under: (SCC p. 573, para 75)

"75. Three propositions are well settled: (i) 'restriction' includes cases of 'prohibition'; (ii) the standard for judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate; and (iii) whether a restriction in effect

<sup>7</sup> AIR 1952 SC 196 : 1952 Cri LJ 966

<sup>8</sup> AIR 1951 SC 118

<sup>9</sup> (2005) 8 SCC 534

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a amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right."

35. The obvious result of the above discussion is that a restriction imposed in any form has to be reasonable and to that extent, it must stand the scrutiny of judicial review. It cannot be arbitrary or excessive. It must possess a direct and proximate nexus with the object sought to be achieved.  
b Whenever and wherever any restriction is imposed upon the right to freedom of speech and expression, it must be within the framework of the prescribed law, as subscribed by Article 19(2) of the Constitution.

36. As already noticed, rights, restrictions and duties coexist. As, on the one hand, it is necessary to maintain and preserve the freedom of speech and expression in a democracy, there, on the other, it is also necessary to place  
c reins on this freedom for the maintenance of social order. The term "social order" has a very wide ambit. It includes "law and order", "public order" as well as "the security of the State". The security of the State is the core subject and public order as well as law and order follow the same.

37. In *Romesh Thappar v. State of Madras*<sup>10</sup> this Court took the view that local breaches of public order were no grounds for restricting the freedom of  
d speech guaranteed by the Constitution. This led to the Constitution (First Amendment) Act, 1951 and consequently, this Court in *Ram Manohar Lohia v. State of Bihar*<sup>11</sup> stated that an activity which affects "law and order" may not necessarily affect "public order" and an activity which might be prejudicial to "public order" may not necessarily affect "security of the State". Absence of "public order" is an aggravated form of disturbance of  
e public peace which affects the general current of public life. Any act which merely affects the security of others may not constitute a breach of "public order".

38. The expression "in the interest of" has given a wide amplitude to the permissible law which can be enacted to impose reasonable restrictions on  
f the rights guaranteed by Article 19(1) of the Constitution.

39. There has to be a balance and proportionality between the right and restriction on the one hand, and the right and duty, on the other. It will create an imbalance, if undue or disproportionate emphasis is placed upon the right of a citizen without considering the significance of the duty. The true source of right is duty. When the courts are called upon to examine the  
g reasonableness of a legislative restriction on exercise of a freedom, the fundamental duties enunciated under Article 51-A are of relevant consideration. Article 51-A requires an individual to abide by the law, to safeguard public property and to abjure violence. It also requires the individual to uphold and protect the sovereignty, unity and integrity of the country. All these duties are not insignificant. Part IV of the Constitution relates to the

h  
10 AIR 1950 SC 124 : (1950) 51 Cr LJ 1514  
11 AIR 1966 SC 740 : 1966 Cr LJ 608

directive principles of the State policy. Article 38 was introduced in the Constitution as an obligation upon the State to maintain social order for promotion of welfare of the people. By the Constitution (Forty-second Amendment) Act, 1976, Article 51-A was added to comprehensively state the fundamental duties of the citizens to complement the obligations of the State. Thus, all these duties are of constitutional significance. a

40. It is obvious that Parliament realised the need for inserting the fundamental duties as a part of the Indian Constitution and required every citizen of India to adhere to those duties. Thus, it will be difficult for any court to exclude from its consideration any of the abovementioned articles of the Constitution while examining the validity or otherwise of any restriction relating to the right to freedom of speech and expression available to a citizen under Article 19(1)(a) of the Constitution. The restriction placed on a fundamental right would have to be examined with reference to the concept of fundamental duties and non-interference with the liberty of others. Therefore, a restriction on the right to assemble and raise protest has also to be examined on similar parameters and values. In other words, when you assert your right, you must respect the freedom of others. Besides imposition of a restriction by the State, non-interference with the liberties of others is an essential condition for assertion of the right to freedom of speech and expression. b  
c  
d

41. In *D.C. Saxena v. Chief Justice of India*<sup>12</sup> this Court held: (SCC pp. 242-43, para 31)

"31. If maintenance of democracy is the foundation for free speech, society equally is entitled to regulate freedom of speech or expression by democratic action. The reason is obvious viz. that society accepts free speech and expression and also puts limits on the right of the majority. Interest of the people involved in the acts of expression should be looked at not only from the perspective of the speaker but also the place at which he speaks, the scenario, the audience, the reaction of the publication, the purpose of the speech and the place and the forum in which the citizen exercises his freedom of speech and expression. The State has legitimate interest, therefore, to regulate the freedom of speech and expression which liberty represents the limits of the duty of restraint on speech or expression not to utter defamatory or libellous speech or expression. There is a correlative duty not to interfere with the liberty of others. Each is entitled to dignity of person and of reputation. Nobody has a right to denigrate others' right to person or reputation. Therefore, freedom of speech and expression is tolerated so long as it is not malicious or libellous, so that all attempts to foster and ensure orderly and peaceful public discussion or public good should result from free speech in the market place. If such speech or expression was untrue and so reckless as to its truth, the speaker or the author does not get protection of the constitutional right." e  
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g  
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<sup>12</sup> (1996) 5 SCC 216

42. Every right has a corresponding duty. Part III of the Constitution of India although confers rights and duties, restrictions are inherent thereunder.

- a Reasonable regulations have been found to be contained in the provisions of Part III of the Constitution of India, apart from clauses (2) to (4) and (6) of Article 19 of the Constitution. (See *Union of India v. Naveen Jindal*<sup>13</sup>.)

43. As I have already discussed, the restriction must be provided by law in a manner somewhat distinct to the term "due process of law" as contained in Article 21 of the Constitution. If the orders passed by the executive are

- b backed by a valid and effective law, the restriction imposed thereby is likely to withstand the test of reasonableness, which requires it to be free of arbitrariness, to have a direct nexus to the object and to be proportionate to the right restricted as well as the requirement of the society, for example, an order passed under Section 144 CrPC. This order is passed on the strength of a valid law enacted by Parliament. The order is passed by an executive authority
- c declaring that at a given place or area, more than five persons cannot assemble and hold a public meeting. There is a complete channel provided for examining the correctness or otherwise of such an order passed under Section 144 CrPC and, therefore, it has been held by this Court in a catena of decisions that such order falls within the framework of reasonable restriction.

44. The distinction between "public order" and "law and order" is a fine one, but nevertheless clear. A restriction imposed with "law and order" in mind would be least intruding into the guaranteed freedom while "public order" may qualify for a greater degree of restriction since public order is a matter of even greater social concern. Out of all expressions used in this regard, as discussed in the earlier part of this judgment, "security of the State" is the paramount and the State can impose restrictions upon the

e freedom, which may comparatively be more stringent than those imposed in relation to maintenance of "public order" and "law and order". However stringent may these restrictions be, they must stand the test of "reasonability". The State would have to satisfy the court that the imposition of such restrictions is not only in the interest of the security of the State but is also within the framework of Articles 19(2) and 19(3) of the Constitution.

45. It is keeping this distinction in mind, the legislature, under Section 144 CrPC, has empowered the District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf, to direct any person to abstain from doing a certain act or to take action as directed, where sufficient ground for proceeding under this section exists and immediate prevention and/or speedy remedy is desirable. By virtue

g of Section 144-A CrPC, which itself was introduced by Act 25 of 2005\*, the District Magistrate has been empowered to pass an order prohibiting, in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organising or holding of any mass drill or mass training with arms in any public place, where it is necessary for him to do so for the

13 (2004) 2 SCC 510

\* Ed.: The Code of Criminal Procedure (Amendment) Act, 2005.

preservation of public peace, public safety or maintenance of public order. Section 144 CrPC, therefore, empowers an executive authority, backed by these provisions, to impose reasonable restrictions vis-à-vis the fundamental rights. The provisions of Section 144 CrPC provide for a complete mechanism to be followed by the Magistrate concerned and also specify the limitation of time till when such an order may remain in force. It also prescribes the circumstances that are required to be taken into consideration by the said authority while passing an order under Section 144 CrPC. a

46. In *Babulal Parate*<sup>2</sup> where this Court was concerned with the contention raised on behalf of the union of workers that the order passed in anticipation by the Magistrate under Section 144 CrPC was an encroachment on their rights under Articles 19(1)(a) and 19(1)(b), it was held that the provisions of the section, which commit the power in this regard to a Magistrate belonging to any of the classes referred to therein cannot be regarded as unreasonable. While examining the law in force in the United States, the Court further held that an anticipatory action of the kind permissible under Section 144 CrPC is not impermissible within the ambit of clauses (2) and (3) of Article 19. Public order has to be maintained at all times, particularly prior to any event and, therefore, it is competent for the legislature to pass a law permitting the appropriate authority to take anticipatory action or to place anticipatory restrictions upon particular kind of acts in an emergency for the purpose of maintaining public order. b  
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47. In *Madhu Limaye v. Sub-Divisional Magistrate, Monghyr*<sup>14</sup> a Constitution Bench of this Court took the following view: (SCC pp. 757-58, paras 23-27)

“23. The procedure to be followed is next stated. Under sub-section (2) if time does not permit or the order cannot be served, it can be made ex parte. Under sub-section (3) the order may be directed to a particular individual or to the public generally when frequenting or visiting a particular place. Under sub-section (4) the Magistrate may either suo motu or on an application by an aggrieved person, rescind or alter the order whether his own or by a Magistrate subordinate to him or made by his predecessor-in-office. Under sub-section (5) where the Magistrate is moved by a person aggrieved he must hear him so that he may show cause against the order and if the Magistrate rejects wholly or in part the application, he must record his reasons in writing. This sub-section is mandatory. An order by the Magistrate does not remain in force after two months from the making thereof but the State Government may, however, extend the period by a notification in the Gazette but, only in cases of danger to human life, health or safety or where there is a likelihood of a riot or an affray. But the second portion of the sub-section was declared e  
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<sup>2</sup> *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cr LJ 16 : (1961) 3 SCR 423 h

<sup>14</sup> (1970) 3 SCC 746 : AIR 1971 SC 2486

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a violative of Article 19 in *State of Bihar v. Kamla Kant Misra*<sup>15</sup>. It may be pointed out here that disobedience of an order lawfully promulgated is made an offence by Section 188 of the Penal Code, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed. It is punishable with simple imprisonment for one month or a fine of Rs 200 or both.

b 24. The gist of action under Section 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequences sufficiently grave. Without it the exercise of power would have no justification. It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under Section 144, Criminal Procedure Code cannot be passed without taking evidence : see *Jagrupa Kumari v. Chobey Narain Singh*<sup>16</sup> which in our opinion is correct in laying down this proposition. These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. Insofar as the other parts of the section are concerned the keynote of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualises as permissible in the interest of public order, or in the interest of the general public. We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order.

f 25. The criticism, however, is that the section suffers from over broadness and the words of the section are wide enough to give an absolute power which may be exercised in an unjustifiable case and then there would be no remedy except to ask the Magistrate to cancel the order which he may not do. Revision against his determination to the High Court may prove illusory because before the High Court can intervene the mischief will be done. Therefore, it is submitted that an inquiry should precede the making of the order. In other words, the burden should not be placed upon the person affected to clear his position. Further the order may be so general as to affect not only a

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15 (1969) 3 SCC 337

16 (1936) 37 Cri LJ 95 (Pat)

particular party but persons who are innocent, as for example when there is an order banning meetings, processions, playing of music, etc.

26. The effect of the order being in the interest of public order and the interests of the general public, occasions may arise when it is not possible to distinguish between those whose conduct must be controlled and those whose conduct is clear. As was pointed out in *Babulal Parate case*<sup>2</sup> where two rival trade unions clashed and it was difficult to say whether a person belonged to one of the unions or to the general public, an order restricting the activities of the general public in the particular area was justified. a

27. ... A general order may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section. A general order is thus justified but if the action is too general, the order may be questioned by appropriate remedies for which there is ample provision in the law." b

48. In *Himat Lal K. Shah v. Commr. of Police*<sup>17</sup>, again a Constitution Bench of this Court, while dealing with a situation where a person seeking permission to hold a public meeting was denied the same on the ground that under another similar permission, certain elements had indulged in rioting and caused mischief to private and public properties, held Rule 7 framed under the Bombay Police Act, 1951 as being arbitrary and observed as under: c

"32. ... It is not surprising that the Constitution makers conferred a fundamental right on all citizens 'to assemble peaceably and without arms'. While prior to the coming into force of the Constitution the right to assemble could have been abridged or taken away by law, now that cannot be done except by imposing reasonable restrictions within Article 19(3). But it is urged that the right to assemble does not mean that that right can be exercised at any and every place. This Court held in *Railway Board v. Niranjan Singh*<sup>18</sup> that there is no fundamental right for any one to hold meetings in government premises. It was observed: (SCC p. 507, para 12) d

'12. ... The fact that the citizens of this country have freedom of speech, freedom to assemble peaceably and freedom to form associations or unions does not mean that they can exercise those freedoms in whatever place they please.' " e

49. Section 144 CrPC is intended to serve public purpose and protect public order. This power vested in the executive is to be invoked after the satisfaction of the authority that there is need for immediate prevention or that speedy remedy is desirable and directions as contemplated are necessary to protect the interest of others or to prevent danger to human life, health or f

<sup>2</sup> *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cr LJ 16 : (1961) 3 SCR 423 g

<sup>17</sup> (1973) 1 SCC 227 : 1973 SCC (Cr) 280 h

<sup>18</sup> (1969) 1 SCC 502 : (1969) 3 SCR 548

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- safety or disturbance of public tranquillity or a riot or an affray. These features must coexist at a given point of time in order to enable the authority concerned to pass appropriate orders. The expression "law and order" is a comprehensive expression which may include not merely "public order" but also matters such as "public peace", "public tranquillity" and "orderliness" in a locality or a local area and perhaps some other matters of public concern too. "Public order" is something distinct from order or orderliness in a local area. Public order, if disturbed, must lead to public disorder whereas every breach of peace may not always lead to public disorder.

50. This concept came to be illustratively explained in the judgment of this Court in *Ram Manohar Lohia*<sup>11</sup> wherein it was held that: (AIR p. 758, para 51)

- "51. ... When two drunkards quarrel and fight, there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order."

However, where the two persons fighting were of rival communities and one of them tried to raise communal passions, the problem is still one of "law and order" but it raises the apprehension of public disorder. The main distinction is that where it affects the community or public at large, it will be an issue relatable to "public order". Section 144 CrPC empowers passing of such order in the interest of public order equitable to public safety and tranquillity. The provisions of Section 144 CrPC empowering the authorities to pass orders to tend to or to prevent the disturbances of public tranquillity is not ultra vires the Constitution.

51. In *State of Karnataka v. Praveen Bhai Thogadia*<sup>19</sup> (SCC p. 691, para 6), this Court, while observing that each person, whatever be his religion, must get the assurance from the State that he has the protection of law freely to profess, practice and propagate his religion and the freedom of conscience, held more emphatically that the

"courts should not normally interfere with matters relating to law and order which is primarily the domain of the administrative authorities concerned. They are by and large the best to assess and handle the situation depending upon the peculiar needs and necessities within their special knowledge".

52. The scope of Section 144 CrPC enumerates the principles and declares the situations where exercise of rights recognised by law, by one or few, may conflict with other rights of the public or tend to endanger public peace, tranquillity and/or harmony. The orders passed under Section 144 CrPC are attempted to serve larger public interest and purpose. As already noticed, under the provisions of CrPC complete procedural mechanism is provided for examining the need and merits of an order passed under Section 144 CrPC. If one reads the provisions of Section 144 CrPC along

<sup>11</sup> *Ram Manohar Lohia v. State of Bihar*, AIR 1966 SC 740 : 1966 Cri LJ 608

<sup>19</sup> (2004)-1 SCC 684 : 2004 SCC (Cri) 1387



with other constitutional provisions and the judicial pronouncements of this Court, it can undisputedly be stated that Section 144 CrPC is a power to be exercised by the specified authority to prevent disturbance of public order, tranquillity and harmony by taking immediate steps and when desirable, to take such preventive measures. Further, when there exists freedom of rights which are subject to reasonable restrictions, there are contemporaneous duties cast upon the citizens too. The duty to maintain law and order lies on the authority concerned and, thus, there is nothing unreasonable in making it the initial judge of the emergency. All this is coupled with a fundamental duty upon the citizens to obey such lawful orders as well as to extend their full cooperation in maintaining public order and tranquillity.

53. The concept of orderly conduct leads to a balance for assertion of a right to freedom. In *Feiner v. New York*<sup>20</sup> the Supreme Court of the United States of America dealt with the matter where a person had been convicted for an offence of disorderly conduct for making derogatory remarks concerning various persons including the President, political dignitaries and other local political officials during his speech, despite warning by the police officers to stop the said speech. The Court, noticing the condition of the crowd as well as the refusal by the petitioner to obey the police requests, found that the conduct of the convict was in violation of public peace and order and the authority did not exceed the bounds of proper State police action, held as under: (L Ed p. 300)

"... It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. The findings of the State courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

54. Another important precept of exercise of power in terms of Section 144 CrPC is that the right to hold meetings in public places is subject to control of the appropriate authority regarding the time and place of the meeting. Orders, temporary in nature, can be passed to prohibit the meeting or to prevent an imminent breach of peace. Such orders constitute reasonable restriction upon the freedom of speech and expression. This view has been followed consistently by this Court. To put it with greater clarity, it can be stated that the content is not the only concern of the controlling authority but the time and place of the meeting is also well within its jurisdiction. If the authority anticipates an imminent threat to public order or public tranquillity, it would be free to pass desirable directions within the parameters of

<sup>20</sup> 95 L Ed 295 : 340 US 315 (1951)

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- reasonable restrictions on the freedom of an individual. However, it must be borne in mind that the provisions of Section 144 CrPC are attracted only in emergent situations. The emergent power is to be exercised for the purposes of maintaining public order.

55. It was stated by this Court in *Romesh Thappar*<sup>10</sup> that the Constitution requires a line to be drawn in the field of public order and tranquillity, marking off, may be roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of peace of a purely local significance, treating for this purpose differences in degree as if they were different in kind. The significance of factors such as security of State and maintenance of public order is demonstrated by the mere fact that the Framers of the Constitution provided these as distinct topics of legislation in Entry 3 of the Concurrent List of the Seventh Schedule to the Constitution.

56. Moreover, an order under Section 144 CrPC being an order which has a direct consequence of placing a restriction on the right to freedom of speech and expression and right to assemble peaceably, should be an order in writing and based upon material facts of the case. This would be the requirement of law for more than one reason. Firstly, it is an order placing a restriction upon the fundamental rights of a citizen and, thus, may adversely affect the interests of the parties, and secondly, under the provisions of CrPC, such an order is revisable and is subject to judicial review. Therefore, it will be appropriate that it must be an order in writing, referring to the facts and stating the reasons for imposition of such restriction. In *Praveen Bhai Thogadia*<sup>19</sup>, this Court took the view that the Court, while dealing with such orders, does not act like an appellate authority over the decision of the official concerned. It would interfere only where the order is patently illegal and without jurisdiction or with ulterior motive and on extraneous consideration of political victimisation by those in power. Normally, interference should be the exception and not the rule.

57. A bare reading of Section 144 CrPC shows that:

- (1) It is an executive power vested in the officer so empowered;
- (2) There must exist sufficient ground for proceeding;
- (3) Immediate prevention or speedy remedy is desirable; and
- (4) An order, in writing, should be passed stating the material facts and the same be served upon the person concerned.

These are the basic requirements for passing an order under Section 144 CrPC. Such an order can be passed against an individual or persons residing in a particular place or area or even against the public in general. Such an order can remain in force, not in excess of two months. The Government has the power to revoke such an order and wherever any person moves the Government for revoking such an order, the State Government is empowered

<sup>10</sup> *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : (1950) 51 Cri LJ 1514  
<sup>19</sup> *State of Karnataka v. Praveen Bhai Thogadia*, (2004) 4 SCC 684 : 2004 SCC (Cri) 1387

to pass an appropriate order, after hearing the person in accordance with sub-section (7) of Section 144 CrPC.

58. Out of the aforesaid requirements, the requirements of existence of sufficient ground and need for immediate prevention or speedy remedy is of prime significance. In this context, the perception of the officer recording the desired/contemplated satisfaction has to be reasonable, least invasive and bona fide. The restraint has to be reasonable and further must be minimal. Such restraint should not be allowed to exceed the constraints of the particular situation either in nature or in duration. The most onerous duty that is cast upon the empowered officer by the legislature is that the perception of threat to public peace and tranquillity should be real and not quandary, imaginary or a mere likely possibility.

59. This Court in *Babulal Parate*<sup>2</sup> had clearly stated the following view: (AIR p. 890, para 26)

"26. The language of Section 144 is somewhat different. The test laid down in the section is not merely 'likelihood' or 'tendency'. The section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety, etc. The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger."

The abovestated view of the Constitution Bench is the unaltered state of law in our country. However, it needs to be specifically mentioned that the "apprehension of danger" is again what can inevitably be gathered only from the circumstances of a given case.

60. Once an order under Section 144 CrPC is passed, it is expected of all concerned to implement the said order unless it has been rescinded or modified by a forum of competent jurisdiction. Its enforcement has legal consequences. One of such consequences would be the dispersement of an unlawful assembly and, if necessitated, by using permissible force. An assembly which might have lawfully assembled would be termed as an "unlawful assembly" upon the passing and implementation of such a preventive order. The empowered officer is also vested with adequate powers to direct the dispersement of such assembly. In this direction, he may even take the assistance of officers concerned and armed forces for the purposes of dispersing such an assembly. Furthermore, the said officer has even been vested with the powers of arresting and confining the persons and, if necessary, punishing them in accordance with law in terms of Section 129 CrPC. An order under Section 144 CrPC would have an application to an "actual" unlawful assembly as well as a "potential" unlawful assembly. This is precisely the scope of application and enforcement of an order passed under Section 144 CrPC.

<sup>2</sup> *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423

61. Having noticed the legal precepts applicable to the present case, it will be appropriate to notice, at this stage, the factual matrix advanced by each of the parties to the case before this Court.

*Version put forward by learned amicus curiae*

62. In 2008, Baba Ramdev was the first person to raise the issue of black money publicly. The black money outside the country was estimated at total of Rs 400 lakh crores or nearly nine trillion US dollars. On 27-2-2011, an anti-corruption rally was held at the Ramlila Maidan, New Delhi where more than one lakh persons are said to have participated. The persons present at the rally included Baba Ramdev, Acharya Balakrishna, Ram Jethmalani, Anna Hazare and many others. On 20-4-2011, the President of Bharat Swabhiman Trust, Delhi Pradesh submitted an application to the MCD proposing to take the Ramlila Maidan on rent, subject to the general terms and conditions, for holding a yoga training camp for 4 to 5 thousand people between 1-6-2011 to 20-6-2011. He had also submitted an application to the Deputy Commissioner of Police (Central District) seeking permission for holding the yoga training camp which permission was granted by the DCP (Central District) vide his letter dated 25-4-2011. This permission was subject to the terms and conditions stated therein.

63. Permission letter dated 25-4-2011 reads as under:  
"With reference to your Letter No. Nil, dated 20-4-2011, on the subject cited above, I am directed to inform you that your request for permission to organise yoga training session at Ramlila Ground from 1-6-2011 to 20-6-2011 by Bharat Swabhiman Trust, Delhi Pradesh has been considered and permission is granted for the same subject to the conditions that there should not be any obstruction to the normal flow of traffic and permission from land owing agency is obtained. Besides this, you will deploy sufficient number of volunteers at the venue of the function. Further, you are requested to comply with all the instructions given by police authorities time to time, failing which this permission can be revoked at any time."

64. Continuing with his agitation for the return of black money to the country, Baba Ramdev wrote a letter to the Prime Minister on 4-5-2011 stating his intention to go on a fast to protest against the Government's inaction in that regard. The Government made attempts to negotiate with Baba Ramdev and to tackle the problem on the terms, as may be commonly arrived at between the Government and Baba Ramdev. This process started with effect from 19-5-2011 when the Prime Minister wrote a letter to Baba Ramdev asking him to renounce his fast. The Finance Minister also wrote a letter to Baba Ramdev informing him about the progress in the matter.

65. On 23-5-2011, Baba Ramdev submitted an application for holding a dharna at Jantar Mantar, which permission was also granted to him vide letter dated 24-5-2011, which reads as follows:

- "With reference to your letter dated 23-5-2011, on the subject mentioned above, I have been directed to inform you that you are

permitted dharna/satyagraha at Jantar Mantar on 4-6-2011 from 0800 hrs to 1800 hrs with a very limited gathering."

In furtherance to the aforesaid permission, it was clarified vide letter dated 26-5-2011 informing the organisers that the number of persons accompanying Baba Ramdev should not exceed two hundred. a

66. On 27-5-2011, the DCP (Central District), on receiving the media reports about Baba Ramdev's intention to organise a fast unto death at the yoga training camp, made further enquiries from Acharya Virendra Vikram requiring him to clarify the actual purpose for such huge gathering. His response to this, vide letter dated 28-5-2011, was that there would be no other programme at all, except residential yoga camp. However, the Special Branch, Delhi Police also issued a special report indicating that Baba Ramdev intended to hold indefinite hunger strike along with 30,000-35,000 supporters and that the organisers were further claiming that the gathering would exceed one lakh. b

67. According to Dr Dhavan, the learned amicus curiae, there is still another angle to this whole episode. When Baba Ramdev arrived at Delhi airport on 1-6-2011, four senior Ministers of the UPA Government met him at the airport and tried to persuade him not to pursue the said fast unto death since the Government had already taken initiative on the issue of corruption. c

68. In the meanwhile, large number of followers of Baba Ramdev had gathered at the Ramlila Maidan by the afternoon of 4-6-2011. In the evening of that very day, one of the Ministers who had met Baba Ramdev at the airport, Mr Kapil Sibal, made public a letter from Baba Ramdev's camp calling off their agitation. This was not appreciated by Baba Ramdev, as, according to him, the Government had not stood by its commitments and, therefore, he hardened his position by declaring not to take back his satyagraha until a proper government ordinance was announced in place of forming a committee. The Ministers talked to Baba Ramdev in great detail but of no avail. It is stated that even the Prime Minister had gone the extra mile to urge Baba Ramdev not to go ahead with the hunger strike, promising him to find a "pragmatic and practical" solution to tackle the issue of corruption. Various attempts were made at different levels of the Government to resolve this issue amicably. Even a meeting of the Ministers with Baba Ramdev was held at Hotel Claridges. d

69. It was reported by the press/media that many others supported the stand of Baba Ramdev. It was widely reported that Mr Sibal had said: "We hope he honours his commitment and honours his fast. This Government has always reached out but can also rein in." The press reported the statement of the Chief Minister, Delhi as stated by the officials including police officers in the words: "Action would be taken if Baba Ramdev's yoga shivir turns into an agitation field and three-tier security arrangements have been made for the shivir which is supported to turn into a massive satyagraha." Even Anna's campaign endorsed Baba Ramdev's step. In this background, on 4-6-2011, Baba Ramdev's hunger strike began with the motto of "bhrashtachar mitao satyagraha", the key demands being the same as were stated on 27-2-2011. e

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70. As already noticed, Baba Ramdev had been granted permission to hold satyagraha at Jantar Mantar, of course, with a very limited number of persons. Despite the assurance given by Acharya Virendra Vikram, as noted above, the event was converted into an anshan and the crowd at the Ramlila Maidan swelled to more than fifty thousand. No yoga training was held for the entire day. At about 1.00 p.m., Baba Ramdev decided to march to Jantar Mantar for holding a dharna along with the entire gathering. Keeping in view the fact that Jantar Mantar could not accommodate such a large crowd, the permission dated 24-5-2011/26-5-2011 granted for holding the dharna was withdrawn by the authorities. Certain negotiations took place between Baba Ramdev and some of the Ministers on telephone, but, Baba Ramdev revived his earlier condition of time-bound action, an ordinance to bring black money back and the items missing on his initial list of demands.

71. At about 11.15 p.m., it is stated that the Centre's emissary reached Baba Ramdev at the Ramlila Maidan with the letter assuring a law to declare black money hoarded abroad as a national asset. The messenger kept his mobile on so the government negotiators could listen to Baba Ramdev and his aides. The conversation with Baba Ramdev convinced the Government that Baba Ramdev will not wind up his protest. At about 11.30 p.m., a team of police, led by the Joint Commissioner of Police, met Baba Ramdev and informed him that the permission to hold the camp had been withdrawn and that he would be detained.

72. At about 12.30 a.m., a large number of CRPF, Delhi Police Force and Rapid Action Force personnel, totalling approximately to 5000 (as stated in the notes of the amicus; however, from the record it appears to be 1200), reached the Ramlila Maidan. At this time, the protestors were peacefully sleeping. Thereafter, at about 1.10 a.m., the police reached the dais/platform to take Baba Ramdev out, which action was resisted by his supporters. At 1.25 a.m., Baba Ramdev jumped into the crowd from the stage and disappeared amongst his supporters. He, thereafter, climbed on the shoulders of one of his supporters, exhorting women to form a barricade around him. A scuffle between the security forces and the supporters of Baba Ramdev took place and eight rounds of tear gas shells were fired. By 2.10 a.m., almost all the supporters had been driven out of the Ramlila Maidan. The police sent them towards the New Delhi Railway Station. Baba Ramdev, who had disappeared from the dais earlier, was apprehended by the police near Ranjit Singh Flyover at about 3.40 a.m. At that time, he was dressed in salwar-kameez with a dupatta over his beard. He was taken to the airport guest house. It was planned by the Government to fly Baba Ramdev in a chopper from Safdarjung Airport. However, at about 9.50 a.m. the Government shelved this plan and put him in an Indian Air Force helicopter and flew him out of the Indira Gandhi International Airport.

73. The learned amicus curiae has made twofold submissions. One on "facts and pleadings" and the other on "law". I may now refer to some of the submissions made on facts and pleadings.

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74. The Ramlila Maidan provided an accurate barometer of the country's political mood in 1960s and 1970s which can be gauged from an article dated 18-8-2011 in *The Times of India*, which stated as under:

"It was in the Ramlila Ground that Jai Prakash Narain along with prominent opposition leaders, addressed a mammoth rally on 25-6-1975, where he urged the armed forces to revolt against Indira Gandhi's Government. Quoting Ramdhari Singh Dinkar, J.P. thundered, 'Singhasan khali karo, ki janta aati hai (vacate the throne, for the people are here to claim it)'. That very midnight, Emergency was declared in the country.

Less than two years later, the ground was the venue for another opposition rally that many political commentators describe as epoch-changing. In February 1977, more than a month before Emergency was lifted, opposition leaders led by Jagjivan Ram, his first public appearance after quitting the Congress, Morarji Desai, Atal Bihari Vajpayee, Charan Singh and Chandrashekar, held a joint rally. That the Ramlila Ground provided an accurate barometer of the country's political mood in the 1960s and 70s can be gauged from the fact that in 1972, just around three years before the J.P. rally, Indira Gandhi addressed a huge rally here following India's victory over Pakistan in the Bangladesh war. In 1965, again at a time when the country was at war with Pakistan, it was from here that the then Prime Minister Lal Bahadur Shastri gave the slogan 'Jai Jawan Jai Kisan'.

According to Delhi historian, Ronald Vivian Smith, the Maidan was originally a pond which was filled up in the early 1930s so that the annual Ramlila could be shifted here from the flood plains behind the Red Fort. It quickly became a popular site for political meetings, with Gandhiji, Nehru, Sardar Patel and other top nationalist leaders addressing rallies here. According to one account, as Jinnah was holding a Muslim League rally here in 1945, he heard someone in the crowd address him as 'Maulana'. He reacted angrily saying he was a political leader and that honorific should never be used for him.

In the 1980s and 90s, the Boat Club became the preferred site for shows of strength. But after the Narasimha Rao Government banned all meetings there during the tumultuous Ayodhya movement, the political spotlight returned to the site where it originally belonged—the Ramlila Ground."

75. Amongst other things, it is a place of protests. In Standing Order 309 issued by the police, it has been stated that "any gathering of over 50,000 should not be permitted at the Ramlila Maidan but should be offered the Burari Grounds as an alternative. If, however, the organisers select a park or an open area elsewhere in Delhi, the same can be examined on merits."

76. Pointing out certain ambiguities and contradictions in various affidavits filed on behalf of various officers of the Government and the police, learned amicus curiae pointed out certain factors by way of conclusions:

"It may be concluded that:

(i) The ground became a major protest area after the Government abolished rallies at the Boat Club.

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(ii) The police's capacity for Ramlila is 50,000 but it limited Baba Ramdev's meet to 5000.

a (iii) The ground appears to be accommodative but with only one major exit and entrance.

(iv) There are aspects of the material that show considerable mobilisation. But the figure of 5000 inside the tent is exaggerated.

(v) The numbers of people in the tent has varied but seems, according to the police, 20,000 or so at the time of the incident. But the Home Secretary suggests 60,000 which is an exaggeration.

b (vi) The logs, etc. supplied seem a little haphazard, but some logs reflect contemporary evidence which shows things to the court's notice especially."

However, it may be noticed by this Court that as per the version of the police, Point (ii) ought to be read as under:

c "The capacity for Ramlila Maidan is 50,000 but it limited Baba Ramdev's meet to 5000."

77. After noticing certain detailed facts in relation to the "threat perception of police" and the "Trust's perception", learned amicus curiae has framed certain questions and has given record-based information as follows:

(I) Crowd peaceful and sleeping.

d 6.1. The crowd entered the Ramlila Ground from one entrance without any hassle and cooperatively (see CD marked CD 003163 of 23 minutes @ 17 minutes). Police was screening each and every individual entering the premises. On 4-6-2011 many TV new (sic) channel live coverage shows about two kilometres long queue to enter the Maidan not even a single was armed, lathi or baseball bats, etc. (p. 8, Vol. 2)

e 6.2. The crowd is already asleep by 10.00-10.30 p.m., shown in newspaper photographs of 5-6-2011 (see p. 9, Vol. 1 and Annexure R-9 pp. 37-38, Vol. 2). People requesting the police with folded hands (Annexure R-9 p. 39, Vol. 2), also recorded in CCTV cameras and in CD 004026 (marked as Item 19, p. 39, Vol. 10).

(II) Did the police enter abruptly to rescind order and remove Baba Ramdev?

f 6.3. The CD marked CD 003163 of 23 minutes on police entry and Baba Ramdev's reaction @ 10 minutes — Baba requests that he should be arrested in the morning with a warrant.

(III) Did Baba Ramdev make an incitory speech?

6.4. In general Baba Ramdev's speech carry aggressive issues but on 4 6 2011,

- g
- no provocation was made by Baba Ramdev in any manner;
  - says he is read (sic ready) to get arrested but his followers should not be harmed;
  - asks his women supporters to form a security ring around him;
  - also requests participants not to fight with police and be calm;
- h
- also requests police not to manhandle his supports. (CDs handed by the Trust in court, the CD marked CD 003163 of 23 minutes @ 10 minutes.)



(IV) Was the lathi-charge (sic charge) ordered? Were lathis used?

6.5. The police itself admits use of water cannon and tear gas but denies lathi-charge. No lathi-charge even ordered on public, no organised lathi-charge by policemen @ Vol. 3, p. 8, paras 30 and 33 at pp. 8-9; but evidence shows that lathi being used; see police beating people with lathis (Vol. 2, photographs at pp. 44-45), also in CD 004026 marked as Item 19, p. 39, Vol. 10 @ 47 minute shows lathi-charge.

(V) Bricks.

6.6. The CD marked R4-TIMEWISE-'B' @ 1 hr 11 m—Police entering from the back area and throwing bricks on the crowd inside the pandal.

(VI) Water cannon and tear gas.

6.7. Initially water cannon used; after it proved ineffective, tear gas fired towards right side of the stage resulting in a small fire. (Para 33, p. 9, Vol. III)

(VII) Injuries.

6.8. On injuries the figures are not clear as per the Commissioner of Police, Delhi Affidavit only *two persons* required hospitalisation for surgery. (Annexure S colly pp. 49-142, Vol. III)

Injured	Numbers	Released on first day	Released on second day	Treatment
Public persons	48	41	05	diagnosis/first aid
Policemen	38			

Injury sheets predominantly indicate injuries received during the minor stampede in one part of the enclosure.

6.9. Newspaper *The Times of India* gives the figure of 62 persons injured and 29 of the injured were discharged during the day in LNJP Hospital. What about those who were in other hospitals? Even there are many who failed to get recorded in the list of injured or to approach hospital for the medical aid. Only 62 injured, that too without lathi-charge.

7. It will also be (sic) demonstrate that

(i) The crowd does not appear to be armed in anyway—not even with baseball bats.

(ii) The police (sic personnel) were throwing bricks.

(iii) Baba Ramdev was abruptly woken up.

(iv) The crowd was asleep.

(v) The police used lathis.

(vi) The crowd also threw bricks.

(vii) The police used tear gas around that time. It is not clear what occurred first.

(viii) Water cannon was also used by the police.

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(VIII) Speech.

7.1. From the videos of Zee News and ANI, it appears that Baba Ramdev

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(i) exhorted people not to fight with police.

(ii) said, 'arrest me in the morning with a warrant'.

(iii) requesting first the women then young boys and then the old to make a protective kavach around him."

78. On these facts, it is the submission of learned amicus curiae that neither the withdrawal of permissions for the Ramlila Maidan and Jantar Mantar nor the imposition of restriction by passing an order under Section 144 CrPC was for valid and good cause/reason. On the contrary, it was for political and mala fide reasons. The purpose was to somehow not permit the continuation of the peaceful agitation at any of these places and for that reason, there was undue force used by the Government. The entire exercise was violative of the rights of an individual. A mere change in the number of persons present and an apprehension of the police could not be a reasonable ground for using tear gas and lathi-charge and thereby unduly disturbing the people who were sleeping peacefully up to 1.00 a.m. on the night of 4-6-2011/5-6-2011 at Ramlila Maidan.

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79. Referring to the affidavits of the Home Secretary, the Chief Secretary, the police officers and the documents on record, the contention is that in these affidavits, the deponents do not speak what is true. The imposition of restriction, passing of the order under Section 144 and the force and brutality with which the persons present at the Ramlila Maidan were dispersed is nothing but a show of power of the State as opposed to a citizen's right. Even the test of "in terrorem" requires to act in a manner and use such force which is least invasive and is in due regard to the right to assemble and hold peaceful demonstration. The threat perception of the authorities is more of a created circumstance to achieve the ultimate goal of rendering the agitation and the anshan unsuccessful by colourable exercise of State power.

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80. It is also the contention of learned amicus that there are contradictions in the affidavits filed by the Home Secretary, Respondent 1 and the Commissioner of Police, Respondent 3. The affidavit of the Chief Secretary, Respondent 2, cannot be relied upon as he pleads ignorance in relation to the entire episode at the Ramlila Maidan. According to the Home Secretary, the Ministry of Home Affairs was routinely monitoring the situation and it is not the practice of the Ministry to confirm the grant of such permission. He also states that 60,000 persons came to the ground as against the estimated entry of 4000 to 5000 people. While according to the affidavit of the Police Commissioner, as a matter of practice, Delhi Police keeps the Ministry of Home Affairs duly informed in such matters as the said Ministry, for obvious reasons, is concerned about the preservation of law and order in the capital and carefully monitors all situations dealing with public order and tranquillity. From the affidavit of the Commissioner of Police, it is also clear that he was continuously in touch with the senior functionaries of the Ministry of Home Affairs and he kept them informed of the decisions taken

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by the ACP and DCP to revoke the permission and promulgate the prohibitory orders under Section 144 CrPC.

81. Besides these contradictions, another very material fact is that the Home Minister, Shri P. Chidambaram had made a press statement on 8-6-2011, relevant part of which reads: a

"A decision was taken that Shri Baba Ramdev would not be allowed to organise any protest or undertake any fast-unto-death at the Ramlila Ground and that if he persisted in his efforts to do so he would be directed to remove himself from Delhi." b

82. Reference is also made to the statement of the Minister of Human Resource Development Shri Kapil Sibal, who had stated that the Government can rein in if persuasion fails.

83. Further, the contention is that these averments/reports have not been denied specifically in any of the affidavits filed on behalf of the Government and Delhi Police. The above statements and contradictions in the affidavits filed by these highly placed government officers should lead to a reasonable conclusion that the police had only carried out the decision, which was already taken by the Government. In these circumstances, even if there was no direct evidence, the Court can deduce, as a reasonable and inescapable inference from the facts proved, that exercise of power was in bad faith. Reliance is placed upon *Pratap Singh v. State of Punjab*<sup>21</sup>. c  
d

84. The affidavits filed on behalf of the police and the Ministry of Home Affairs are at some variance. The variance is not of the nature that could persuade this Court to hold that these affidavits are false or entirely incorrect. This Court cannot lose sight of a very material fact that maintenance of law and order in a city like Delhi is not an easy task. Some important and significant decisions which may invite certain criticism, have to be taken by the competent authorities for valid reasons and within the framework of law. The satisfaction of the authority in such decisions may be subjective, but even this subjective satisfaction has to be arrived at objectively and by taking into consideration the relevant factors as are contemplated under the provisions of Section 144 CrPC. Some freedom or leverage has to be provided to the authority making such decisions. The courts are normally reluctant to interfere in exercise of such power unless the decision-making process is ex facie arbitrary or is not in conformity with the parameters stated under Section 144 CrPC itself. e  
f

85. From the record, it can reasonably be inferred that the Ministry of Home Affairs and Delhi Police were working in coordination and the police was keeping the Ministry informed of every development. There is some element of nexus between the Government's stand on the demands of Baba Ramdev, its decision in that regard and the passing of an order under Section 144 CrPC but, this by itself would not render the decision as that taken in bad faith. The decision of the Ministry or the police authorities may not be correct, but that ipso facto would not be a ground for the Court to believe that it was a colourable and/or mala fide exercise of power. g  
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21 AIR 1964 SC 72 : (1964) 4 SCR 733

*Version of Respondent 4*

86. Now, I may refer to the case put forward by Respondent 4, the
- a President of Bharat Swabhimani Trust, Delhi Area who has filed affidavits on behalf of that party. At the outset, it is stated in the affidavits filed that Baba Ramdev, the Trust and his followers are law-abiding citizens of the country and never had any intention to disturb the law and order, in any manner whatsoever. Various camps and meetings have been held by the Trust in various parts of the country and all such meetings have been peaceful and
  - b successful as well. Baba Ramdev had been travelling the length and breadth of the country explaining the magnitude of the problem of corruption and black money and failure of the Government to take effective steps. The anti-corruption movement had been at the forefront of the meetings held by Baba Ramdev at different places. Baba Ramdev is stated to have participated in a meeting against corruption at Jantar Mantar on 14-11-2010 where more
  - c than 10,000 people had participated. Similar meetings were organised at the Ramlila Maidan on 30-1-2011 and 27-2-2011, which also included a march to Jantar Mantar. None of these events were perceived by the Government as any threat to law and order and, in fact, they were peaceful and conveyed their theme of anti-corruption.

87. On 4-5-2011, Baba Ramdev had written a letter to the Prime Minister
- d stating his intention to go on fast to protest against the Government's inaction against bringing back the black money. This was responded to by the Prime Minister on 19-5-2011 assuring him that the Government was determined to fight the problem of corruption and black money in the economy and illegal deposits in the foreign countries and asking him to drop the idea of going on a hunger strike till death. On 20-5-2011, the Trust had written a letter to the
  - e police seeking permission to hold a fast unto death at Jantar Mantar protesting against the Government's inaction against corruption. The Finance Minister had also written a letter to Baba Ramdev on 20-5-2011 regarding the same issue. The dates of applying for permission to hold yoga camp and to hold dharna at Jantar Mantar and dates of granting of such permissions are not in dispute. The abovenoticed dates of applying for permission and to hold
  - f dharna at Jantar Mantar and their consequential approval are not disputed by this respondent.

88. According to this respondent, the police had attempted to make a huge issue that the permission granted to the trust was to hold a yoga camp of approximately 5000 persons and not a fast with thousands of persons attending. It is submitted by this respondent that police was concerned with
- g the maintenance of law and order, free flow of traffic, etc. The use of land was the concern of the owner of the land, in the present case, Municipal Corporation of Delhi (MCD). The Trust had applied to MCD requesting it for giving on rent/lease the Ramlila Maidan for the period commencing from 1-6-2011 to 20-6-2011. Before grant of its permission, MCD had written to the Trust that they should obtain NOC from the Commissioner of Police,
  - h Delhi which was duly applied for and, as already noticed, obtained by the Trust. Of course, it was a conditional NOC and the conditions stated therein

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had been adhered to, whereafter, MCD had given the Ramlila Maidan on lease to the Trust. The permission was revoked by the police and not by MCD and MCD never asked the Trust to vacate the premises i.e. the Ramlila Maidan. a

89. Before the fateful night i.e. 4-6-2011/5-6-2011, it has been stated that Baba Ramdev had reached New Delhi and was received at the airport by the Ministers. There, at the airport itself, an attempt was made to persuade Baba Ramdev to call off his fast. Thereafter, a meeting was held at Hotel Claridges on 3-6-2011 wherein Baba Ramdev was assured that the Government would take concrete steps to bring back the black money from abroad and they would also issue an ordinance, whereupon he should call off his fast. b

90. On 4-6-2011, from 5.00 a.m., the yoga camp was started at the Ramlila Maidan. This was also telecast live on Astha TV and other channels. During the yoga camp, Baba Ramdev stated that he will request the Government to follow the path of satya and ahinsa aparigriha and he would make efforts to eradicate corruption from the country. He also informed that the black money should be brought back and he would perform tapas for the nation in that shivir. Thousands of people had gathered at the venue. The police was present there all this time and the number of persons was already much in excess of 5000. It is emphasised, in the affidavit of this respondent, that as per the directions of the police, only one entry and one exit gate were being kept open and this gate was manned by the police personnel themselves, who were screening each and every person who entered the premises. There was no disturbance or altercation, whatsoever, and the followers of Baba Ramdev were peacefully waiting in queues that stretched for over two kilometres. If the police wanted to limit the number to 5000, it could have easily stopped the people at the gate itself. However, no such attempt was made. This conduct of the police goes to indicate that the police action resulted from instructions from the Government and their current stand regarding the number of persons present is nothing but an afterthought. This respondent further asserts that there was no impediment to the free flow of traffic at any time on the day of the incident. c d e

91. In the afternoon of 4-6-2011, when the preparations for starting the fast at Jantar Mantar began, senior officers of Delhi Police requested the officials of the Trust not to proceed to Jantar Mantar. In obedience of this order, the fast was begun at the Ramlila Maidan itself. During the course of negotiations with the Government, Baba Ramdev was assured that their demands in relation to black money and corruption would be met. This led to a festive atmosphere at the Ramlila Maidan at around 7.00 p.m. However, later on, the government representatives took the stand that no such assurances were given by them. Consequently, Baba Ramdev issued a statement that he will discuss the matter only with the Finance Minister or any other responsible person. At around 10.00 p.m., shanti paath was performed and everybody went to sleep as ashtang yoga training was scheduled for 5.00 a.m. next morning. f g h

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92. At around 11.00 p.m., the Personal Assistant of Shri Sibal delivered a letter to Acharya Balkrishna as Baba Ramdev was asleep at that time, stating as follows:

- a "This is to clarify that the Government is committed to build a legal structure through which wealth generated illegally is declared as a national asset and that such assets are (sic) subject to confiscation. Laws also provide for exemplary punishment for those who perpetrate ill-gotten wealth. This clearly declares the intention of the Government. You have already publicly stated that upon receiving this letter, you will end your tapa. We hope that you will honour this public commitment forthwith."

This letter, it is stated, was found to be vague and non-committal as it was not mentioned in this letter as to what concrete steps the Government would take to tackle these national economic and moral crises.

- c 93. At nearly midnight, by way of an unprecedented action, an order under Section 144 CrPC along with an order cancelling the permission granted earlier by the police, was issued, illegally, without any justification and without adequate warning. It is specifically denied that this order was served on any officer of the Trust. Around 12.30 a.m., more than 5000 policemen (as stated in the notes of the amicus; however, from the record it appears to be 1200 police personnel) had surrounded the tent while everyone inside it was sleeping. When asked by Baba Ramdev to furnish the arrest warrant, the police refused to do so. Baba Ramdev requested all the sadhakas to maintain peace and ahimsa.

- e 94. This respondent also alleges that the police disabled the public address system. Consequently, Baba Ramdev got off the stage and exhorted his followers to maintain peace and calm. There was an apprehension that the police intended to kill Baba Ramdev and therefore, protective cordons were formed around Baba Ramdev. In order to gain access to Baba Ramdev, police launched brutal attack on the crowd, including women. Use of tear gas shells was also resorted to, causing a part of the stage to catch fire which could potentially have caused serious casualties. Policemen were also engaged in stone-pelting and looting. This event lasted till 4.00 a.m. As a result several people including women received injuries. Spinal cord of a woman named Rajbala was broken that left her paralysed. Respondent 4 contends that the media footage publicly available substantiates these contentions.

- g 95. While leaving the Ramlila Maidan, the police allegedly sealed access to the help camp at Bangla Sahib Gurdwara. The press release and interview given by the Minister of Home Affairs on 8-6-2011 stresses that the order of externment of Baba Ramdev from Delhi after cancellation of permission for the fast/protest was determined in advance and was to be enforced in the event he "persisted" in his efforts to protest. The requirements for an order of externment under Section 47 of the Delhi Police Act, 1978 (for short "the DP Act") had, therefore, not been satisfied at the time of such decision and

such order was not served on Baba Ramdev at any point. They also failed to make Baba Ramdev aware of any alleged threat to his life. It is stated that the police have failed to register FIRs on the basis of complaints of 50 to 60 people including that given by one Shri Jagmal Singh dated 10-6-2011. a

96. On these facts, it is the submission of Respondent 4 that it is ironic that persons fasting against failure of the Central Government to tackle the issue of corruption and black money have been portrayed as threats to law and order. Citizens have a fundamental right to assembly and peaceful protest which cannot be taken away by an arbitrary executive or legislative action. The law prescribes no requirements for taking of permission to go on a fast. Respondent 4 suggests that in order to establish the truth of the incident, an independent Commission should be constituted, based on whose report, legal action to be taken in such situations should be determined. b

97. With reference to the above factual averments made by Respondent 4, the argument advanced by Mr Ram Jethmalani, Senior Advocate, is that, in the earlier meetings, both at the Ramlila Maidan and Jantar Mantar, no untoward incident had occurred, which could, by any standard, cause an apprehension in the mind of the police that there could occur an incident, communal or otherwise, leading to public disorder, in any way. The revocation of permissions as well as the brutality with which the gathering at the Ramlila Maidan was dispersed is impermissible and, in any case, contrary to law. The Ground belongs to Municipal Corporation of Delhi and the permission had duly been granted by the said Corporation for the entire relevant period. This permission had never been revoked by the Corporation and as such the police had no power to evict the public from the premises of the Ramlila Maidan. c d e

98. The police had also granted a "no-objection certificate" (NOC) for holding the meeting and the withdrawal of NOC is without any basis and justification. The purpose for granting of permission by the police was primarily for the reason that:

- (a) The Corporation had required such permission to be obtained;
- (b) There should be no obstruction to the traffic flow; and
- (c) There should be proper deployment of volunteers in adequate number. f

None of the stated conditions, admittedly, had been violated and as such there was no cause for the police authorities to withdraw the said permission.

99. In fact, it is the contention on behalf of this respondent that there was no requirement or need for taking the permission of the police for holding such a function. Reliance in this regard is placed upon the judgment of this Court in *Destruction of Public and Private Properties, In re*<sup>22</sup>. Even if for the sake of arguments, it is assumed that there was a requirement for seeking permission from the police and the police had the authority to refuse such a h

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- permission and such authority was exercised in accordance with law, then also this respondent and the public at large were entitled to a clear and sufficient notice before the police could use force to disperse the persons present at the site.

100. Imposition of an order under Section 144 CrPC was neither called for nor could have been passed in the facts and circumstances of the present case. It is contended that the police itself was an unlawful assembly. It had attacked the sleeping persons, after midnight, by trespassing into the property, which had been leased to the respondent Trust. The use of tear gas, lathi-charge, brickbatting and chasing the people out of the Ramlila Maidan were unjustifiable and brutal acts on the part of the police. It was completely disproportionate not only to the exercise of the rights to freedom of speech and expression and peaceful gathering, but also to the requirement for the execution of a lawful order. The restriction imposed, being unreasonable, its disproportionate execution renders the action of the police unlawful. This brutality of the State resulted in injuries to a large number of persons and even in death of one of the victims. There has also been loss and damage to the property.

101. Another aspect that has been emphasised on behalf of this respondent is that there was only one gate for "entry" and one for "exit", besides the VIP entry near the stage. This was done as per the directive of the police. The entry gate was completely manned by the police and each entrant was frisked by the police to ensure security. Thus, the police could have easily controlled the number and manner of entry to the Ramlila Maidan as they desired. At no point of time were there more than 50,000 people present at the premises. On the contrary, in the midnight, when the police used force to evict the gathering, there were not even 20,000 people sleeping in the tent.

102. Lastly, it is also contended that the people at the Ramlila Maidan were sleeping at the time of the occurrence. They were woken up by the police, beaten and physically thrown out of the tents. In that process, some of the persons lost their belongings and even suffered damage to their person as well as property. Neither was there any threat to public tranquillity nor any other material fact existed which could provide adequate basis or material to the authorities on the basis of which they could take such immediate preventive steps, including imposition of the prohibitory order under Section 144 CrPC. In fact, the order was passed in a pre-planned manner and with the only object of not letting Baba Ramdev to continue his fast at the relevant date and time. All this happened despite full cooperation by Baba Ramdev. He had voluntarily accepted the request of the police not to visit Jantar Mantar along with his followers on 4-6-2011 itself. Everything in the Ramlila Maidan was going on peacefully and without giving rise to any reasonable apprehension of disturbance of public order/public tranquillity. These orders passed and executed by the executive and the police did not satisfy any of the essential conditions as postulated under Section 144 CrPC.



*Police version*

103. The Commissioner of Police, Delhi has filed various affidavits to explain the stand of the police in the present case. I may notice that there is not much variation in the dates on which and the purpose for which the permissions were granted by the competent authority as well as the fact that the Ramlila Maidan was given by MCD to Respondent 4. a

104. According to the police also, the Trust, Respondent 4, had sought permission to hold yoga camp for 4000 to 5000 people from 1-6-2011 to 20-6-2011 and the same was granted subject to the conditions stated above. Baba Ramdev had made a statement in the media indicating his intention to hold anshan. Upon seeking clarification by the DCP, Central District vide letter dated 27-5-2011, the Acharya by their letter dated 28-5-2011 had reaffirmed their stand that a yoga camp was to be held. It is the case of Respondent 3 that on 30-5-2011, Special Branch, Delhi Police had issued a special report that Baba Ramdev would proceed on an indefinite hunger strike with 30,000-35,000 persons and, in fact, the organisers of Respondent 4 were claiming that the gathering may exceed even one lakh in number. b

105. The permission to hold the yoga camp was granted to Respondent 4. Citing certain inputs, the DCP issued a warning to Respondent 4 expressing his concern about the variance of the purpose as well as that there should be a limited gathering, otherwise the authorities would be compelled to review the permission. The DCP issued law and order arrangements detailing the requirement of force for dealing with such a large gathering. Further, inputs given on 3-6-2011 had indicated that Baba Ramdev was being targeted by certain elements so as to disrupt communal harmony between Hindus and Muslims. Advice was made for review and strengthening of security arrangements. As a result thereto, security of Baba Ramdev was upgraded to Z+ category vide order dated 3-6-2011 and a contingency plan was also drawn. c

106. On 4-6-2011, despite assurances, the yoga training was converted into anshan at about 1300 hrs and Baba Ramdev decided to march to Jantar Mantar for "dharna" with the entire gathering, the permission for which was limited to only 200 people. Therefore, in view of the huge mass of people likely to come to Jantar Mantar, the said permission was withdrawn on 4-6-2011. Baba Ramdev refused to accept the order and, in fact, exhorted his followers to stay back in Delhi and called for more people to assemble at Ramlila Maidan, which was already full. The verbal inputs received by the Joint Commissioner of Police indicated the possibility of further mobilisation of large number of people by the next morning. The Ramlila Maidan is surrounded by communally hypersensitive localities. Late at night, the crowd had thinned down to a little over 20,000. Since a large number of people were expected to gather on the morning of 5-6-2011, the permission granted to the Trust was also withdrawn and prohibitory orders under Section 144 CrPC were issued. d

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107. In view of the above, the DCP considered it appropriate to immediately serve the order on Baba Ramdev requiring him and the people present to vacate the Ramlila Maidan.

108. According to these affidavits, force was deployed to assist the public in vacating the Ramlila Maidan. Buses were deployed at gates and ambulances, fire tenders, PCR vans were also called for. Baba Ramdev refused to comply with the orders. On the contrary, he jumped into the crowd, asked women and elderly persons to form a cordon around him in order to prevent the police from reaching him. No hearing was claimed by Baba Ramdev or any of his associates. This sudden reaction of Baba Ramdev created commotion and resulted in melee. Baba Ramdev exhorted his followers not to leave the Ramlila Maidan. Baba Ramdev, later on along with his followers, went on to climb the stage which is stated to have collapsed. The supporters of Respondent 4 had stocked the bricks behind the stage and were armed with sticks and baseball bats. The crowd started brickbattling and throwing security gadgets, flower pots, etc., at the police from the stage resulting in injuries to policemen and a minor stampede in public in a part of the enclosure. Baba Ramdev vanished from the stage with his female followers. A few members of the public jumped from the stage and got injured. Police exercised maximum restraint and used minimum force. To disperse the crowd, they initially used water cannons, which when proved ineffective, tear gas shells, only on right side of the stage, were used in a controlled manner. It is stated that this situation continued for around two hours and the police did not have any intention to forcibly evacuate the public from the Ramlila Maidan. As Baba Ramdev decided to evade the police, the situation at the Ramlila Maidan became volatile. The print media have given reports on the basis of incorrect facts or hearsay.

109. It is also stated in this affidavit that a total of 38 policemen and 48 public persons were injured and according to the medical reports, public persons sustained injuries during the minor stampede which occurred in one part of the enclosure. Most of these persons were discharged on the same date. The press clipping/reports do not present a complete picture of the incident and contained articles based on incorrect facts. The incident was unfortunate but was avoidable, had the organisers acted as law-abiding citizens and accepted the lawful directions of the police.

110. Having stated that the tear gas shelling and other force was used as a response to the brickbattling and misbehaviour by the gathering, it is also averred that the affidavit filed on behalf of Respondent 4 could not be relied upon as the person swearing it was admittedly not present at the venue after 10.30 p.m. on 4-6-2011. All these actions are stated to have been taken by the police force in consultation with the senior officers and no instructions are stated to have been received from the Ministry of Home Affairs, although the said Ministry was kept informed and apprised of the development from time to time. All this was done in the interest of public order, larger security concern and preservation of law and order.

111. Permission of Delhi Police is required by anyone planning to hold public functions at public places. Delhi Police, having granted such permission, was fully competent to revoke it as well as to pass orders under Section 144 CrPC. The organisers of Respondent 4 had misled the police and the Special Branch report had clarified the situation on 30-5-2011 that the intention was to hold indefinite hunger strike. It is stated that by the evening of 3-6-2011, only 5000 persons had arrived. It is the case of the police that they had persuaded Baba Ramdev not to go to Jantar Mantar with his followers and, therefore, the dharna at Jantar Mantar was cancelled. It was the apprehension of the police that the gathering would increase several folds by the next morning and that could raise a major law and order problem and there was a possible imminent threat to public safety. Thus, the permission was withdrawn and order under Section 144 CrPC was passed. a b

112. Delhi Police confirms that it had been communicating information at the level of the Secretary to the Ministry of Home Affairs and any discussion or communication beyond that level is a matter in the domain of that Ministry itself. It was only in consequence of the violent retaliation by the crowd that use of tear gas, water cannons and finally lathi-charge was taken recourse to by the police. The video footage shows that a group of supporters of Respondent 4 standing on one side of the stage started throwing bricks and flower pots, etc. The police also found the bricks stacked behind the stage. It was the brickbattling and the atmosphere created by the crowd that resulted in a minor stampede. c d

113. Further, it is stated that the pandal was open on all sides, ceiling was high and there were enough escape routes and the use of tear gas in such a situation is not prohibited. Eight tear gas shells were used to prevent the police from being targeted or letting the situation turn violent and all precautions were taken before such use. No police officer was found to be hitting any person. Respondent 4 had been asked to install sufficient CCTV cameras and M/s Sai Wireless removed the cameras and DVRs installed by them immediately after the incident on 5-6-2011. The proprietor had even lodged a complaint at Police Station Kamla Market and a case of theft under FIR No. 49 of 2011 was registered. The said concern, upon being called for the same by a notice under Section 91 CrPC, produced 10 DVRs containing more than 190 hours of video. The investigation of that case revealed that out of 48 cameras ordered by the organisers, only 44 were installed, 42 were made operational out of which two remained non-functional and recording of one could not be retrieved due to technical problems. Recording of eight cameras and two DVRs were not available as these equipments were reportedly stolen, as noted above. Thus, the recordings from only 41 cameras/DVRs were available. e f g

114. The primary aim of MCD is to earn revenue from commercial use of the land and it is for the police to take care of the law and order situation and to regulate demonstrations, protests, marches, etc. No eviction order was passed except that the permissions were cancelled and order under Section 144 CrPC was made. h

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115. On 25-7-2011, another affidavit was filed by the Commissioner of Police stating that nearly 155 complaints in writing and/or through email were received by Police Station Kamla Market alleging beating by the police, theft and loss of property i.e. belongings of the complainants, 13 out of them were duplicate, 11 anonymous and 35 emails were in the nature of comments. On investigation, only four persons responded to the notice under Section 91 CrPC, but stated facts different from what had been noticed in the complaints. Some complaints were also being investigated in case FIR No. 45 of 2011 registered at the same police station.

116. It is further the case, as projected during hearing, that probably one Smt Rajbala, who was on the stage with Baba Ramdev, had fallen from the stage and became unconscious. This complaint was also received at Police Station Kamla Market and was entered at Para 26-A dated 6-6-2011.

117. Still, in another affidavit dated 20-9-2011 filed on behalf of Respondent 3, it was specifically denied that any footages had been tampered with. The police had climbed to the stage, firstly, to serve the order and, thereafter, only when the entire incident was over and it was denied that Rajbala was beaten by the police. It is stated that the respondents, including Respondent 4, have isolated a segment of footage wherein few policemen are throwing bricks on tents near the stage. It is stated to be an isolated incident and was a reaction of few policemen to a spate of bricks thrown by Baba Ramdev's supporters. With regard to the injuries and cause of death of Smt Rajbala who died subsequent to the issuance of notice by this Court, it is averred that she was given medical aid and was admitted to the ICU. There was no external injury on her body. It is also stated that she was offered medical help of rupees two lakhs which was not accepted. She was a case of "gross osteoporosis", that too, to the extent that she was being managed by "endocrinologist" during her treatment. As stated, according to the medical literature, osteoporosis of this degree could make her bones brittle and prone to fracture even by low intensity impact.

118. While relying upon the above averments made in different affidavits, the submission on behalf of Respondent 3 is that there being no challenge to Standing Order 309, provisions of the DP Act and the Punjab Police Rules and even the order passed under Section 144 CrPC, the action of Delhi Police has to be treated as a reasonable and proper exercise of power. The organisers of Respondent 4 had misrepresented to the Government and the police authorities with regard to holding of the yoga camp. The Trust is guilty of seeking permission on incorrect pretext. The effort on behalf of the police was that of carefully watching the development rather than taking any rash decisions and cancelling the permission earlier than when it was actually cancelled.

119. The right to freedom in a democracy has to be exercised in terms of Article 19(1)(a) subject to public order. Public order and public tranquillity is a function of the State which duty is discharged by the State in the larger public interest. The private right is to be waived against public interest. The action of the State and the police was in conformity with law. As a large number of persons were to assemble on the morning of 5-6-2011 and

considering the other attendant circumstances seen in the light of the inputs received from the intelligence agencies, the permission was revoked and the persons attending the camp at the Ramliila Maidan were dispersed.

120. Even if for the sake of argument, it is taken that there were some stray incidents of police excessiveness, the act at best can be attributable to individual actions and cannot be treated or termed as an organisational brutality or default. Individual responsibility is different from responsibility of the force. Abuse by one may not necessarily be an abuse of exercise of power by the force as a whole. The police had waited for a considerable time inasmuch as the order withdrawing the permission was passed at about 9.30 p.m. and was brought to the notice of the representatives of Respondent 4 at about 10.30 p.m. and no action was taken by the police till approximately 1 a.m. This was for the fact that the persons were sleeping and the police wanted them to disperse in a peaceful manner, but it was the stone-pelting, the panic created by the organisers and the consequent stampede that resulted in injuries to some persons. The contention is also that the organisers are responsible for creating the unpleasant incident on the midnight of 4-6-2011/5-6-2011 and they cannot absolve themselves of the responsibilities and liabilities arising therefrom. The police had acted in good faith and bona fide. Therefore, the action of the police cannot be termed as arbitrary, mala fide or violative of the basic rule of law.

121. Lastly, Mr Harish Salve, learned Senior Counsel appearing for Respondent 3, contended that there are certain issues which this Court need not dwell upon and decide as they do not directly arise for determination in the facts and circumstances of the present case:

(a) Whether it was necessary for MCD to direct and for organisers to take permission from Delhi Police?

(b) Cancellation of permission for holding of dharna/agitation at Jantar Mantar.

(c) Validity of the orders passed by the State including the order passed under Section 144 CrPC.

122. I have noticed, in some detail, the version of each of the parties before the Court in response to the suo motu notice. Before analysing the respective versions put before the Court by the parties and recording the possible true version of what happened which made the unfortunate incident occur, I would like to notice that I am not prepared to fully accept the last contention raised by Mr Harish Salve, in its entirety. Of course, it may not be necessary for this Court to examine the effect of the cancellation of permission for Jantar Mantar and validity of the orders passed by the Government, but this Court is certainly called upon to deal with the question whether it was obligatory for the organisers, Respondent 4, to seek the permission of the police for holding such a large public demonstration. Therefore, I would be touching the various aspects of this issue and would deal with the orders of the State to the extent it is necessary to examine the main issue in regard to the excessive use of force and brutality and absolute organisational default by the police, if any.

*Findings on incident of midnight of 4-6-2011/5-6-2011 and the role of police and members/followers of Respondent 4*

- a 123. All national and Delhi edition newspapers dated 5-6-2011 as well as the media reports had reported the unfortunate incident that occurred on the midnight of 4-6-2011/5-6-2011 at the Ramlila Maidan in Delhi. On the night of 4-6-2011, all the men and women, belonging to different age groups, who had come to the Ramlila Maidan to participate in the yoga training camp called as "Nishulk Yoga Vigyan Shivar", were comfortably sleeping at the
  - b Ramlila Maidan, when suddenly at about midnight, the people were woken up. The Joint Commissioner of Police sought to serve the order revoking the permission granted to hold the said yoga camp and imposing Section 144 CrPC, purportedly to curb any agitation at the Ramlila Maidan. There was commotion at the Ramlila Maidan. Persons who had suddenly woken up from sleep could not know where and how to go. It appears that Baba
  - c Ramdev did not receive the orders. However, some of the officials of Bharat Swabhimani Trust were made aware of the orders.
124. Thereafter, the police made an attempt to disperse the gathering at about and after 1.00 a.m. on 4-6-2011/5-6-2011. They are stated to have resorted to use of tear gas and lathi-charge in order to disperse the crowd as they were unable to do so in the normal course. Since there was protest by
- d the people and some violence could result, the police used tear gas and lathi-charge to ensure dispersement of the assembly which had, by that time, been declared unlawful. As a result of this action by the police, a number of men and women were injured, some seriously. This also finally resulted into the death of one Smt Rajbala.
  - e 125. This action of the police was termed as brutal and uncalled for by the press. Headlines in the various newspapers termed this unfortunate incident as follows:  
*Times of India* dated 6-6-2011:  
"Why Centre went from licking to kicking"  
"Ramlila Ground never saw so much drama"  
"She may be paralysed for life"  
"Women not spared, we were blinded by smoke"  
"Cops claim terror alert to justify midnight raid"  
"Swoop not Sudden, cops trailed Ramdev for 3 days"  
"After eviction they chant and squat on road"  
"Protestors armed with bricks, baseball bats cops"
  - g *Indian Express* dated 6-6-2011:  
"Baba gives UPA a sleepless summer"  
"Week ago, Home, Delhi Police told Government: look at plan the show"  
"Getting Ramdev out"  
"Yielding and bungling—Cong (Weak) Core Group"
  - h

126. This event was described with great details in these news items and articles, along with photographs. Besides the fact that large number of persons were injured and some of them seriously, there was also damage to the property. The question raised before this Court, inter alia, included the loss and damage to the person and property that resulted from such unreasonable restriction imposed, its execution and invasion of fundamental right to speech and expression and the right to assembly, as protected under Articles 19(1)(a) and 19(1)(b). It is contended that the order was unreasonable, restriction imposed was contrary to law and the entire exercise by the police and the authorities was an indirect infringement of the rights and protections available to the persons present there, including Article 21 of the Constitution.

127. These events and the prima facie facts stated above, persuaded this Court to issue a suo motu notice vide its order dated 6-6-2011. This notice was issued to the Home Secretary, Union of India, the Chief Secretary, Delhi Administration and the Police Commissioner of Delhi to show cause and file their personal affidavits explaining the conduct of the police authorities and the circumstances which led to the use of such brutal force and atrocities against the large number of people gathered at Ramlila Maidan.

128. In reply to the above notice, different affidavits have been filed on behalf of these authorities justifying their action. A notice was issued to Bharat Swabhiman Trust vide order dated 20-6-2011<sup>23</sup>. The application for intervention on behalf of Rajbala (now deceased) was allowed vide order dated 29-8-2011<sup>24</sup>. They filed their own affidavit. In order to ensure proper independent assistance to the Court, the Court also appointed an amicus curiae and Dr Dhavan accepted the request of the Court to perform this onerous job.

129. Having taken into consideration the version of each party before this Court, I would now proceed to find the facts and circumstances emerging from the record before the Court that led to the unfortunate incident of the midnight of 4-6-2011/5-6-2011. Without any reservation, I must notice that in my considered view, this unfortunate incident could have been avoided with proper patience and with mutual deliberations, taken objectively in the interest of the large gathering present at the Ramlila Maidan. Since this unfortunate incident has occurred, I have to state with clarity what emerges from the record and the consequences thereof.

130. As already noticed, the yoga camp at the Ramlila Maidan had begun with effect from 1-6-2011 and was continuing its normal functioning with permission from the police as well as with due grant of licence by MCD. Undoubtedly, Respondent 4 had the permission to also hold a dharna at Jantar Mantar on 4-6-2011 to raise a protest in relation to various issues that had been raised by Baba Ramdev in his letters to the Government and in his address to his followers. These permissions had been granted much in

<sup>23</sup> *Ramlila Maidan Incident, In re.* (2012) 5 SCC 125

<sup>24</sup> *Ramlila Maidan Incident, In re.* (2012) 5 SCC 126

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a advance. As a response to the pamphlets issued and the inputs of the intelligence agencies, the DCP (Central District), Delhi had expressed certain doubts vide his letter dated 27-5-2011 asking for clarification as to the actual number of persons and the real purpose for which the Ramlila Maidan would be used from 1-6-2011. To this, Respondent 4 had promptly replied stating that there will be no other event except the residential yoga camp. However, keeping in view the information received, the Deputy Commissioner of Police, Central District, vide his letter dated 1-6-2011 had issued further directions for being implemented by Respondent 4 and reiterated his earlier requirements, including that number of the gathering should remain within the limits conveyed. In this letter, it was also indicated that the authorities may review the position, if necessary.

c 131. However, on 3-6-2011, it had been noticed that a huge gathering was expected in the programme and also that the inputs had been received that Baba Ramdev would sit on an indefinite hunger strike with effect from 4-6-2011 in relation to the issues already raised publicly by him. After noticing various aspects, including that various terrorist groups may try to do something spectacular to hog publicity, Respondent 3 made a very objective assessment of the entire situation and issued a detailed plan of action to ensure smooth functioning of the agitation/yoga camp at the Ramlila Maidan without any public disturbance. The objectives stated in this planned programme have duly been noticed by me above.

e 132. All this shows that the authorities had applied their mind to all aspects of the matter on 2-6-2011 and had decided to permit Baba Ramdev to go on with his activities. In furtherance to it, the Deputy Commissioner of Police, Central District had also issued a restricted circular as contingency plan. It is obvious from various letters exchanged between the parties that as on 3-6-2011, there had been a clear indication on behalf of the authorities concerned that Baba Ramdev could go on with his plans and, in fact, proper plans had been made to ensure security and regulation of traffic and emergency measures were also put in place. As I have already indicated, there is nothing on record to show, if any information of some untoward incident or any other intelligence input was received by the authorities which compelled them to invoke the provisions of Section 144 CrPC, that too, as an emergency case without any intimation to the organisers and without providing them an opportunity of hearing.

g 133. The expression "emergency" even if understood in its common parlance would mean an exigent situation (see *Black's Law Dictionary*, 12th Edn.); a serious, unexpected, and potentially dangerous situation requiring immediate action (see *Concise Oxford English Dictionary*, 11th Edn.). Such an emergent case must exist for the purpose of passing a protective or preventive order. This may be termed as an "emergency protective order" or an "emergency preventive order". In either of these cases, the emergency must exist and that emergent situation must be reflected from the records which were before the authority concerned which passed the order under Section 144 CrPC. There are hardly any factual averments in the affidavit of



the Commissioner of Police which would show any such emergent event happening between 3-6-2011 and 4-6-2011.

134. Similarly, nothing appears to have happened on 4-6-2011 except that the permission to hold a dharna at Jantar Mantar granted to Respondent 4 was withdrawn and the police had requested Baba Ramdev not to proceed to Jantar Mantar with the large number of supporters, which request was acceded to by Baba Ramdev. He, in fact, did not proceed to Jantar Mantar at all and stayed at the Ramlila Maidan.

135. It is also noteworthy that after his arrival on 1-6-2011 at the airport, Baba Ramdev met few senior Ministers of the Government in power. He also had a meeting with some Ministers at Hotel Claridges on 3-6-2011. The issues raised by Baba Ramdev were considered and efforts were admittedly made to dissuade Baba Ramdev from holding satyagraha at Jantar Mantar or an indefinite fast at the Ramlila Maidan. However, these negotiations failed. According to the reports, the Government failed to keep its commitments, while according to the Government, Baba Ramdev failed to keep up his promise and acted contrary even to the letter that was given by him to the Ministers with whom he had negotiated at Hotel Claridges. Thus, there was a deadlock of negotiations for an amicable resolution of the problems.

136. This is the only event that appears to have happened on 3-6-2011 and 4-6-2011. On the morning of 4-6-2011, the yoga camp was held at the Ramlila Maidan peacefully and without disturbing public order or public tranquillity. After the day's proceedings, the large number of people who were staying at the Ramlila Maidan, went to sleep in the shamiana itself where due arrangements had already been made for their stay. Beds were supplied to them, temporary toilets were provided and water tanks and arrangements of food had also been made. The footages of the CCTV cameras, videos and the photographs, collectively annexed as Annexure 9 to the affidavit of Respondent 4, establish this fact beyond any doubt that all persons, at the relevant time, were peacefully sleeping.

137. According to the police, on 4-6-2011, Baba Ramdev had delivered a speech requesting people from various parts of the country to come in large number and join him for the satyagraha. The order withdrawing the permission for holding a yoga shivir at the Ramlila Maidan was passed at 9.30 p.m. The police reached the Ramlila Maidan in order to inform the representatives of Respondent 4 about the passing of the said order, after 10.30 p.m. At about 11.30 p.m., on the same date, the executive authority passed an order under Section 144 CrPC. The police officers came to serve this order upon the representatives of Respondent 4 much thereafter. The footages of the CCTV Cameras 2, 3, 4, 7, 8, 9, 12, 15, 17, 18 and 32 show that even at about 1.00 a.m. in the night of 4-6-2011/5-6-2011, people were sleeping peacefully. The police arrived there and tried to serve the said order upon the representatives of Respondent 4 as well as asked for Baba Ramdev, who was stated to be taking rest in his rest room. However, the action of the police officers of going on the stage and of some of them moving where

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- a people were sleeping obviously caused worry, fear and threat in the minds of the large number of persons sleeping in the tent. It is the conceded position before this Court that nearly 15,000 to 20,000 persons were present in the tent at the relevant time.

- b 138. The CCTV camera footages clearly show the police officers talking to Baba Ramdev and probably they wanted to serve the said orders upon him. However, Baba Ramdev withdrew from the deliberations and jumped from the stage amidst the crowd. By this time, a large number of persons had gathered around the stage. After climbing on to the shoulders of one of his followers, Baba Ramdev addressed his followers. He exhorted them to form a cordon around him in the manner that the women forming the first circle, followed by youth and lastly by rest of his supporters. This circle is visible in the evidence placed before the Court. I do not consider it necessary to refer to the speech of Baba Ramdev to the crowd in any greater detail.

- c 139. Suffice it to note that while addressing the gathering, Baba Ramdev referred to his conversations with the Government, urged the crowd to chant gayatri mantra, maintain shanti and not to take any confrontation with the police. He further stated that he would not advise the path of hinsa, but at the same time, he also stated about his talks with the Government and reiterated  
d that he will not leave, unless the people so desired and it was the wish of God. He also chanted the gayatri mantra, and wished all the people around him. At the same time, it is also clear from the evidence of the CCTV cameras' footage and the photographs, that Baba Ramdev had referred to the failure of his talks with the Government and his desire to continue his anshan. He also, in no uncertain terms, stated, "Babaji will go only if people  
e wanted and the God desires it."

- f 140. Another significant part of Baba Ramdev's speech at that crucial time was that he urged the people not to have any confrontation with the police and that he had no intention/mind to follow the path of hinsa or to instigate quarrel with the authorities. By this time, all persons present in the tent had already woken up and were listening to Baba Ramdev interacting with the police. Some people left while a large number of people were still present in the shamiana. According to the police, brickbatting started from one corner of the stage and it was only in response thereto, they had fired the tear gas shells on and around the stage. In all, eight tear gas shells were fired. According to the police, they did not resort to any lathi-charge and, in fact, they had first used water cannons. According to Respondent 4, the police had  
g first fired tear gas shells, then lathi-charged the persons present and never used water cannons. According to them, the police even threw bricks from behind the stage at the people and the control room and it was in response thereto that some people might have thrown bricks upon the police.

- h 141. What is indisputable before this Court is that the police as well as the followers of Baba Ramdev indulged into brickbatting. Tear gas shells were fired at the crowd by the police and, to a limited extent, the police

resorted to lathi-charge. After a large number of police personnel, who are stated to be more than a thousand, had entered the Ramlila Maidan and woken up the persons sleeping, there was commotion, confusion and fear amongst the people. Besides that, it had been reported in the press that there was lathi-charge. Men and women of different age groups were present at the Ramlila Maidan. The photographs also show that a large number of police personnel were carrying lathis and had actually beaten the persons, including those sitting on the ground or hiding behind the tin shed, with the same. a

142. CCTV Camera 5 shows that the police personnel were also throwing bricks. The same camera also shows that even the followers of Baba Ramdev had used the fire extinguishing gas to create a curtain in front, when they were throwing bricks at the police and towards the stage. The CCTV cameras also show the police pushing the persons and compelling them to go out. The police personnel can also be seen breaking the barriers between the stage and the ground where the people were sitting during the yoga sessions. The photographs also show some police personnel lifting a participant from his legs and hands and trying to throw him out. The photographs also show an elderly sick person being attended to and carried by the volunteers and not by the police. b

143. The documents on record show that some of the police personnel certainly abused their authority, were unduly harsh and violent towards the people present at the Ramlila Maidan, whereas some others were, in fact, talking to the members of the gathering as well as had adopted a helpful attitude. The brickbatting resorted to by both sides cannot be justified in any circumstances whatsoever. Even if the followers of Respondent 4 acted in retaliation to the firing of tear gas, still they had no cause or right in law to throw bricks towards the stage, in particular, towards the police and it is a hard fact that some police personnel were injured in the process. Similarly, the use of tear gas shells and the use of lathi-charge by the police, though limited, can hardly be justified. In no case, brickbatting by the police can be condoned. They are the protectors of the society and, therefore, cannot take recourse to such illegal methods of contralling the crowd. There is also no doubt that a large number of persons were injured in the action of the police and had to be hospitalised. Element of indiscipline on behalf of the police can be seen in the footage of the CCTV cameras as well as in the logbook entries of the police. c

144. At this stage, it will be useful to examine the police records in this respect. Police arrangements had been made in furtherance to the arrangements planned by the Central District of Police, Delhi dated 2-6-2011. Copies of the police logbook have been placed on the file. As on 5-6-2011 at about 1.28 a.m., a message was flashed that the whole staff of the police stations concerned shall report to Police Station Kamla Market immediately. Then, an attempt was made to arrest Baba Ramdev and an apprehension was expressed that there could be some deaths. d

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145. I may reproduce here the relevant messages from the police logbook to avoid any ambiguity:

a

145.1. "District Net

Date	Start time	Duration	Call detail
5-6-2011	03:22:53	00:00:33	Ramlila Ground, Kamla Market policemen are beating the people Ph. 971147860 W/Ct. Sheetal No. 8174/PCR"

b

145.2. "Transcription of DM Net, dated 4-6-2011 from 0200 hrs to 0000 hrs

Inform C-28, C-31, C-35, C-32 & C-4 and C-5 that they would meet me after 30 min. and the 4 SHO's will bring about 20 personnel each from their PS."

c

145.3. "Transcript of DM Net

Extract of Tetra DM Net of Central District, dated 5-6-2011 from 0100 hrs to 0500 hrs (taken from the tetra recording)

d

218	C-50	C-2	The force which is standing outside at Turkman gate and Gurunanak Chowk having gas gun will come inside through VIP gate instantly.
225	12-D C-50 C-50	C-50 12-D C-2	Understood. The operator of gas gun which is sent has not reported yet only driver is sitting operator is to be sent quickly.
225	C-Q	C-50	The officer who has sent the gas gun will send the operator. is driver to operate it.
226	12-D	C-50	Operator of gas gun is to be sent only driver has reached there with gas gun.
227 227	C-50 C-50	12-D C-50 C-2	I don't have gas gun. SHOs has already reached inside with staff. How many water cannons are there?
227	C-2	C-50	Madam water cannon is outside at VIP gate where I have informed earlier.
305	C-50	C-24	This is informed that the force guard 88 Battalion CRPF is neither obeying any instruction nor ready to come at any cost."

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145.4. "Wireless log and diary, dated 5-6-2011 (Shift duty 9 a.m. to 9 p.m.) T-52

Time			Call detail
2.25 a.m.	01-T-52		One injured, namely, Jagat Muni, s/o unknown, r/o VII-Plana (Rohak), Haryana. Age about 55-60 yrs admitted in JPN Hospital in unconscious condition."

a

145.5. "Wireless log and diary, dated 4-6-2011/5-6-2011

Time			Call details
2.20 a.m.	L-100	0-1	PCR call: That some casualties happened at Ramlila Ground. Direct the ambulance.
	0-1	L-100	Noted position at Ramlila Ground.
2.28 a.m.	0-1	L-100	Injured not traceable. CATS ambulance also searching injured person."

b

c

145.6. "Wireless log and diary, dated 4-6-2011/5-6-2011 L-100

Time			Call details
8 a.m.			Charge of O-33 taken by ASI Ved Prakash 5150/PCR.
	0-33	0-1	Note down that in Ramlila Ground, police is beating the public persons.
	0-1	0-33	Road is blocked through barricades at Ajmeri Gate. We cannot leave the vehicle without staff."

d

145.7. "Wireless log and diary, dated 4-6-2011/5-6-2011 (Shift night duty 8 p.m. to 8 a.m.) 0-60

Time			Call detail
1.58	0-60	0-1	Police is misbehaving with Baba Ramdev."

e

145.8. "Wireless log and diary, dated 4-6-2011/5-6-2011 (Shift night duty 8 p.m. to 8 a.m.) 0-10

Time			Call details
8 p.m.			Shift change and charge taken by HC Umed Singh, No. 899/PCR.
2 a.m.	0-1	0-10	From 0-10 SI Jaspal PS Mangol Puri and Ct. Tarun 3036/DAP sustained injury and we are taking them to JPN Hospital.
2.10	0-1	0-10	0-10 told that both SI Jaspal and Ct. Tarun admitted in JPN Hospital through Duty Ct. Ajay 1195/C."

f

g

h

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145.9. "Wireless log and diary, dated 4-6-2011/5-6-2011 (Shift night B-11 duty 8 p.m. to 8 a.m.)

a	Time		Call detail
	2.30 a.m.		Two injured persons taken to JPN Hospital, namely, Rajbala, w/o Jalbeer, t/o Gurgaon, age 54 yrs. Jagdish s/o Asha Nand, age 54 yrs.

b	207	C-50	C-12D	Both of vehicles are to be sent, water cannon is only one.
	207	C-12D	C-50	Right now only one is asked about so send only one.
	207	C-12D	C-50	Send one. Send one instantly. If other will be required it will be informed."

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146. The above entries of the police logbook clearly show that a number of persons were injured, including police personnel, and some of them even seriously. The water cannons were not available inside the tent and the same were asked to come towards the VIP gate. They were only two in number and were asked to be positioned at the VIP entrance. In fact, as recorded in one of the above entries, there was only one water cannon available which was positioned at the VIP entry gate and the version of the police that it had first used water cannons for dispersing the crowd before resorting to the use of tear gas, does not appear to be correct. The tear gas shells were fired at about 2.20 a.m., as per the footages of the CCTV cameras and around the same time, the bricks were thrown by the followers of Respondent 4 upon the police. This aggravated the situation beyond control and, thereafter, the police acted with greater force and fired more tear gas shells and even used lathis to disperse the crowd.

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147. Another aspect reflecting the lacuna in planning of the police authorities for executing such an order at such odd hour is also shown in the logbook of the police where at about 2.39 a.m., a conversation between two police officers has been recorded. As per this conversation, it was informed, "You call at cellphone and inform 24-B that he will also talk and that gate towards JLN Marg which was to be opened is not open yet." Another conversation recorded at the same time was, "Then public will go at its own." When the police had decided to carry out such a big operation of evicting such a large gathering suddenly, it was expected of it to make better arrangements, to cogitate over the matter more seriously and provide better arrangements.

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148. From the entries made in the police logbook, certain acts come to surface. Firstly, that there were inadequate number of water cannons, as admittedly, there were more than 15,000 persons present at the Ramila Maidan and secondly, that the police had started beating the people. Even the 88th Battalion of CRPF was not carrying out the orders and there was chaos

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at the premises. Even if all the documents filed by the police, the police logbook and the affidavits on behalf of the police are taken into consideration, it reflects lack of readiness on the part of the police and also that it had not prepared any action plan for enforcing the order of the executive authority passed under Section 144 CrPC. It was expected of the police to make elaborate, adequate and precise arrangements to ensure safe eviction of such a large number of persons, that too, at midnight. a

149. Having dealt with this aspect, now I would proceed to discuss the injuries suffered and the medical evidence placed before the Court. As per the affidavit of the police dated 17-6-2011, total 38 policemen were injured, some of them because of brickbattling by the supporters of Baba Ramdev. 48 persons from public were also injured, 41 of them were discharged on the same date and 5 on the next day. Only 2 persons, including 1 woman, required hospitalisation for medical treatment and surgery. On the other hand, according to Respondent 4, hundreds of persons were injured. However, they have placed on record a list of the injured persons as Annexure R-13 wherein names of 55 persons have been given. Most of the injured persons were taken to Lok Nayak Hospital, New Delhi. Copies of their medico-legal enquiry register/reports have been placed on record. Some of these injured persons were taken to the hospital by the police while some of them went on their own. b c d

150. In the medico-legal enquiry register relating to Rajbala, it has been stated that she suffered cervical vertebral fracture and associated spinal cord damage. She was unable to move both limbs, upper and lower, and complained of pain in the neck. She was treated in that hospital and subsequently shifted to the ICU where she ultimately died. As per the post-mortem report, the cause of death as opined by the doctor was stated as "death in this case occurred as septicaemia, following cervical vertebral fracture and associated spinal cord damage". In some of the reports, it is stated that the patient had informed of having suffered injury due to stampede at the Ramlila Maidan. The person who claims to have brought Rajbala to the hospital, Joginder Singh Bandral, has also filed an affidavit stating that the police had suddenly attacked from the stage side and she had suffered injuries and fell unconscious. e f

151. It is undisputed that Rajbala suffered injuries in this incident. The injuries as described in the medical records are as follows:

*"Local examination:*

1. Reddish-bluish discolouration below and behind left ear and another reddish-blue discolouration in lateral middle of neck on (left) side present. g
2. Reddish-bluish discolouration seen below and behind (right) ear C.
3. Large bluish discolouration present over left buttock.
4. Abrasion over medial aspects of left ankle.
5. Reddish discolouration over the flexor aspect of middle of left forearm." h

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152. In addition, the medico-legal case sheet of one Deepak recorded, "alleged c/o assault while on hunger strike at Ramlila Maidan". He was vomiting, bleeding and had suffered injuries and was complaining of pain at cervical region and right thigh. Similar was the noting with regard to one Ajay. Both of them had gone to Dr Ram Manohar Lohia Hospital and were not accompanied by the police. A number of such medico-legal case sheets have been placed on record with similar notings. I do not consider it necessary to discuss each and every medico-legal enquiry sheet or medico-legal report. It is clear from the bare reading of these reports that most of the persons who were taken to the hospital had suffered injuries on their hands, back, thighs, etc. and were complaining of pain and tenderness which was duly noticed by the doctors in these reports.

153. Constable Satpal had also gone to the hospital. According to him, he had suffered injury "a contusion" as a result of stone-pelting at the Ramlila Maidan. Copies of medico-legal enquiry register in relation to other police officers have also been placed on record. Some police personnel had also reported to Aruna Asaf Ali Government Hospital, Rajpura, Civil Lines, Delhi and had given the history of being beaten by the crowd at the Ramlila Maidan.

154. From these evidence placed on record, it is clear that both, the members of the public as well as the police personnel, had suffered injuries. It is obvious from various affidavits, that a large number of followers of Baba Ramdev got injured. The number of these persons was much higher in comparison to that of the police. I may also notice that in the affidavit filed by the Commissioner of Police, it has been stated that the police officers suffered injuries because of brickbating by some members of the gathering at the Ramlila Maidan. However, the affidavit of the Commissioner of Police is totally silent as to how such a large number of persons suffered injuries, including plain injuries, cuts, open injuries and serious cases like those of Rajbala and Jagat Muni. According to Respondent 4, at least five persons had suffered serious injuries including head injury, fracture of hand, leg and backbone. This included Dharamveer, Madantlal Arya, Jagdish, Behen Rajbala, Swami Agnivesh and Jagat Muni, etc.

155. If this medico-legal evidence is examined in the light of the photographs placed on record and the CCTV camera footages, it becomes clear that these injuries could have been caused by lathi-charge and throwing of stone by the police as well as the members of the gathering. It cannot be doubted that some members of the police force had taken recourse to lathi-charge and in the normal course, a blow from such lathis could cause the injuries, which the members of the public had suffered.

156. I have no hesitation in rejecting the submission on behalf of the police that none of the police personnel lathi-charged the people present at the Ramlila Maidan. The factum of lathi-charge by some of the police personnel is demonstrated in the photographs, footages of CCTV cameras as well as from the medical evidence on record. One Dr Jasbir has filed an affidavit stating that he had made a call from his Cell Phone No. 9818765641



to No. 100 informing them of police assaulting the persons present and the fact that he suffered injury as a result of lathi-blows on his body. He had gone to Lok Nayak Hospital where he was medically examined. This medical record shows that he was assaulted by the police in Baba Ramdev's rally where he sustained injuries. The injuries were described as contusion injuries, one of which, was on the lumbar region and was advised x-ray. Even in some of the other medical records produced before this Court, it has been recorded that injuries were caused by blunt objects. This will go to show that they were not the injuries caused merely by fall or simply stampede.

157. The veracity of this affidavit was challenged on the ground that it has been filed belatedly and it was not supported by any other record. Both these aspects lose their significance because in the police logbook filed on record, call from this number has been shown, secondly, the medical record of Dr Jasbir has been placed on record. Also, the injuries received by the members of the police force are of the kind which could be caused by brickbating. It is further possible that because of commotion, confusion and fear that prevailed at the stage during midnight and particularly when people were sleeping, the injuries could also have been suffered due to stampede. According to the police, Rajbala probably had suffered the fracture of the cervical spine as she fell from the stage and fell unconscious. This version does not find support from the CCTV camera footages inasmuch as that no elderly lady at all is seen on the stage during the entire episode shown to the Court. But, the fact of the matter is that she suffered serious injuries which ultimately resulted in her death. It could be that she received injury during use of lathis by the police or when the crowd rushed as a result of firing of tear gas shells, etc.

158. The police do not appear to have carried her on the stretcher or helped her in providing transportation to the hospital. Precisely who is to be blamed entirely and what compensation, if any, she is entitled to receive and from whom, will have to be examined by the court of competent jurisdiction before whom the proceedings, if any, are taken by the persons entitled to do so and in accordance with law. Certain disputed questions of fact arise in this regard and they cannot be decided by the court finally without granting opportunity to the appropriate parties to lead oral and documentary evidence, as the case may be. For the purposes of the present petition, it is sufficient for me to note that, prima facie, it was the negligence and a limited abuse of power by the police that resulted in injuries and subsequent death of Smt Rajbala. Thus, in my considered view, at least some ad hoc compensation should be awarded to the heirs of the deceased and other injured persons as well.

159. At this juncture, I would take note of the affidavits filed by the parties. In the affidavit dated 6-7-2011 filed on behalf of Respondent 4, it has been specifically stated in Para 17:

"It must be noted that as per the directions of the police, only one entry/exit gate was being kept open and this gate was manned by the police themselves, who were screening each and every person who

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a entered the premises. There was no disturbance or altercation whatsoever and followers of Baba Ramdevji were peacefully waiting in queues that stretched for over two kilometres. If the police wanted to limit the number of participants to 5000 or to any other number, they could easily have done so at the gate itself. However, they made no attempt to either curtail the entry of persons or to prevent the fast from proceeding."

b 160. Though an affidavit subsequent to this date has been filed on behalf of the police, there is no specific denial or any counter-version stated therein in this regard. This averment made in the affidavit of Respondent 4 appears to be correct inasmuch as vide its letter dated 2-6-2011, while granting the permission for holding the rally at the Ramlila Maidan, a condition had been imposed that all persons entering the Ramlila Maidan should be subjected to frisking and personal search. Furthermore, the map of the layout of the Ramlila Maidan filed by the learned amicus clearly shows that there was one public entry gate/public check-in, in addition to the two gates for the VIP check-in, which were towards the stage. The public entry was towards Sharbia Road. From this, it is clear and goes in line with the situation at the site, exhibited by the photographs or the CCTV cameras at least partially, that there was only one main entry for the public which was being managed by the police. Even according to the police, it was a huge enclosure of nearly 2.5 lakh sq ft and it had various exits which, of course, were kept closed and there was a ceiling all over. A tent of this size with the ceiling thereon, was an enclosure, where such a large number of persons had gathered to participate in the yoga camp and thereafter, in the anshan.

e 161. It is the version of the police that they had issued prior warning, then used water cannons and only thereafter, used the tear gas shells in response to the brickbattling by the members of the gathering present behind the stage. This stand of the police does not inspire confidence. Firstly, it has nowhere been recorded in the CCTV camera footages that they made any public announcement of the revocation of the permissions and the passing of order under Section 144 CrPC and requested the people present to leave the Ramlila Maidan. Of course, it is clear from the record before this Court that effort was made by the police officers, who had a talk with the representatives of Respondent 4 as well, for service of order on Baba Ramdev, who did not accept the order and jumped into the crowd in order to avoid the service of order as well as his exit from the Ramlila Maidan. The stand taken by the police in Para 24 of its affidavit is that they apprehended a backlash if they made the announcements themselves and, therefore, they approached the organisers to inform the public over the public address (PA) system. This itself is not in accordance with the guidelines framed by the police for execution of such orders.

g 162. Standing Order 309 contemplates that there should be display of banner indicating promulgation of Section 144 CrPC, repeated use of public address system by a responsible officer appealing/advising the leaders and demonstrators to remain peaceful and come forward for memorandum, their deputation, etc. or court arrest peacefully and requires such announcement to

be videographed. It further contemplates that if the crowd does not follow the appeal and turns violent, then the assembly should be declared as unlawful on the PA system and the same should be videographed. Warning on PA system prior to the use of any kind of force is to be ensured and also videographed. I find that there is hardly any compliance with these terms of this standing order. a

163. Use of water cannons by the police is again a myth.. As I have already noticed from the police logbook there was only one water cannon available which was positioned at the VIP entrance. Furthermore, even the CCTV camera footages or the photographs do not show any use of water cannons. I see no reason for the police not making preferential use of water cannons to disperse the crowd even if they had come to the conclusion that it was an unlawful assembly and it was not possible to disperse the crowd without use of permissible force in the prescribed manner. b

164. There is a serious dispute as to whether the tear gas shells were fired in response to the brickbattling by the members of the assembly from behind the stage or was it in the reverse order. The photographs show that there was a temporary structure behind the stage where bricks were lying and the same were collected and thrown from there. CCTV Camera 5 clearly shows that some members of the assembly (followers of Baba Ramdev) collected the bricks and then threw the bricks at the police towards the stage. The first tear gas shell was fired at about 2.20 a.m. The first brick probably was thrown from behind the stage by Baba Ramdev's followers approximately at 2.12 a.m. The tear gas shells were also fired during this time. Before that, some members of the police force had used sticks or lathi-charged on the people to move them out of the Ramlila Maidan. Some photographs clearly show the police personnel hitting the members of the assembly with sticks. The exact time of these incidents is not available on the photographs. The firing of tear gas shells created greater commotion and fear in the minds of the members of the gathering. The violence on the part of the police increased with the passage of time and the police retaliated to the bricks hurled at them by the members of the assembly with greater anger and force. This resulted in injuries to both sides and serious injuries to some of the people and resultant death of one of the members of the public. c d e f

165. The persons at the helm of affairs of the police force have to take a decision backed by their wisdom and experience whether to use force or exercise greater control and restraint while dispersing an assembly. They are expected and should have some freedom of objectively assessing the situation at the site. But in all events, this would be a crucial decision by the authorities concerned. In the present case, the temptation to use force has prevailed over the decision to exercise restraint. g

166. Rule 14.56(1)(a) of the Punjab Police Rules (which are applicable to Delhi) provides that the main principle to be observed is that the degree of force employed shall be regulated according to the circumstances of each case. The object of the use of force should be to quell the disturbance of h

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peace or to disperse the assembly which threatens such disturbance and has either refused to disperse or shows a determination not to disperse.

- a 167. Standing Order 152 deals particularly with the use of tear smoke in dispersal of unlawful assemblies and processions. This standing order concerns itself with various aspects prior to as well as steps which are required to be taken at the time of use of tear smoke. It requires that before tear smoke action is commenced, a suitable position should be selected for the squad, if circumstances permit, forty yards away from the crowd. A regular warning by the officer should be issued while firing the tear smoke shells, the speed of wind, area occupied by the crowd and the temper of the crowd, amongst others, should be taken into consideration. It states that apparently the object of the use of force should be to prevent disturbance of peace or to disperse an unlawful assembly which threatens such disturbance.
- c 168. Normally, it is not advisable to use tear smoke shells in an enclosure. They should be fired away from the crowd rather than into the crowd. Unfortunately, the guidelines and even matters of common prudence have not been taken into consideration while firing the tear gas shells. The police force and, at least, some members of the police force, have failed to execute the orders in accordance with the standing orders and have failed to take various steps that were required to be taken including use of minimum force, videography of the event, display of banner, announcement into the PA system, etc. Similarly, some members of the force when incited by provocation or injury, used excessive force, including use of tear gas. It is also clear from the photographs and the CCTV cameras that some members of the force inflicted injuries by indulging in uncalled for lathi-charge and by throwing stones on the public. It is evident that lathi-charge against those persons was not called for. For example, in one of the CCTV cameras, one individual is surrounded by four-five members of the force and then a police personnel used caning against that individual.

- f 169. I will proceed on the basis that tear gas shells were fired in retaliation to the brickbatting by the crowd. Even in that event, the police should have made proper announcements. The police had sufficient preparedness to protect itself against such attack and they should have fired the tear gas shells to the site from where the bricks were coming rather than in front and on the stage. Once the tear gas shells were fired into the tent where a large number of people were present, it was bound to result in injuries and harm to the public at large. If the authorities had taken the decision to disperse the crowd by the use of tear gas, then they should have implemented that decision with due care and precautions that they are required to take under the relevant guidelines and the Rules. It was primarily the firing of the tear gas shells and use of cane sticks against the crowd that resulted in stampede and injuries to a large number of people.
- g 170. Admittedly, when the police had entered the tent, the entire assembly was sleeping. It is not reflected in the affidavit of the police as to what conditions existed at that time compelling the authorities to use force.

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This, in the opinion of the Court, was a crucial juncture and the possibility of requiring the members of the assembly to disperse peacefully in the morning hours was available with the authorities.

171. This certainly does not mean that throwing of bricks upon the police by the members of the assembly can be justified on any ground. The few persons who were behind the stage and threw the bricks, either from the corner of the stage or from behind the stage, are guilty of the offence that they have committed. Nothing absolves them of the criminal liability that ensues their actions. Even if tear smoke shells were fired by the police first, still the crowd had no justification to throw bricks at the police and cause hurt to some of the policemen.

172. The police had a duty to keep a watch on the people from the point of view of maintaining law and order. It appears that firing of tear gas shells in the direction of the crowd was contrary to the guidelines and it led to some people getting breathless and two of them falling unconscious. This also prevented the people present there from reaching the exit gates. Similarly, some of the followers of Respondent 4 became unruly and used smoke to create a curtain in front of themselves, before they started throwing bricks at the police. In the process, they injured their fellow participants as well as the police personnel. The tear gas shells also caused fire on the stage, as is demonstrated in CCTV Camera 31 at about 2.22 a.m., and confirmed by various news report footages. It shows that there was lack of fire extinguishing systems. The tear gas shells also caused fire in an enclosure with cloth material which could have caught fire that might have spread widely causing serious bodily injuries to the people present. Undoubtedly, large police force was present on the site and even if it had become necessary, it could have dispersed the crowd with exercise of greater restraint and patience.

173. The police force has failed to act in accordance with the Rules and standing orders. Primarily, negligence is attributable to some members of the force. The police, in breach of their duty, acted with uncontrolled force. The orders were passed arbitrarily by the authorities concerned and, thus, they are to be held responsible for the consequences in law. As discussed in this judgment, Respondent 4, its members and Baba Ramdev committed breach of their legal and moral duty and acted with negligence contributing to the unfortunate incident rendering themselves liable for legal consequences resulting therefrom.

174. I may further notice that the conduct of the representatives of Respondent 4, as well as of Baba Ramdev in jumping from the stage into the crowd, while declining to accept the orders and implement them, is contrary to the basic rule of law as well as the legal and moral duty that they were expected to adhere to. Thus, they have to be held guilty of breach of these legal and moral duties as *injuria non excusat injuriam*.

175. Now, I may have a look at the genuineness/validity of the "threat perception" which formed the basis for passing of the said orders by the

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- State/police. I have referred to this aspect in some detail above and suffice it to note here that till 3-6-2011, none of the authorities had considered it appropriate to revoke the permission and pass an order under Section 144 CrPC. On the contrary, the authorities had required the organisers to take more stringent measures for proper security. They had also drawn a proper deployment plan. It appears that failure of negotiations between the Government and Baba Ramdev at Hotel Claridges on 3-6-2011, left its shadow on the decision-making power of the police. This proved to be the turning point of the entire episode. If the police had apprehended that a large number of persons may assemble at the Ramlila Maidan, this could have been foreseen as a security threat. Therefore, the proper method for the authorities would have been to withdraw the permissions well in time and enforce them peacefully. It has been left to the imagination of the Court as to what were the circumstances that led to passing of orders revoking permission and particularly when even MCD had not cancelled or revoked its permission in favour of Respondent 4 to continue with its activity till 20-6-2011.

176. Great emphasis was placed, on behalf of the police, upon the fact that the representatives of Respondent 4 had not given the correct information to the police. This again does not describe the correct state of affairs. The Intelligence Agencies had given all requisite information to Delhi Police and after taking the same into consideration, Delhi Police had passed orders on 2-6-2011 and 3-6-2011 requiring the organisers to take certain precautionary steps. Another interesting fact, that I must notice, is that as early as on 20-5-2011, representatives of Respondent 4 had written to the Additional Commissioner of Police vide Annexure R-3 informing them that Baba Ramdev is going on a hunger strike till death from 4-6-2011 against the issue of corruption and other related serious issues. Hundreds of satyagrahis were providing their support to him in this hunger strike and consent for that was asked. The letter written by Baba Ramdev to the Prime Minister of the country had also been attached along with this letter. The police was aware of the number of persons who might assemble and the activity that was likely to be carried on at the Ramlila Maidan as well as Jantar Mantar. Still, after the receipt of the letter, the police took no steps to cancel the permission specifically and the permissions granted continued to be in force.

177. It was for the police authorities or the administration to place on record the material to show that there was a genuine threat or reasonable bias of communal disharmony, social disorder and public tranquillity or harmony on the night of 4-6-2011. However, no such material has been placed before this Court. Right from *Babulal Parate*<sup>2</sup>, this Court has taken a consistent view that the provisions of Section 144 CrPC cannot be resorted to merely on imaginary or likely possibility or likelihood or tendency of a threat. It has not to be a mere tentative perception of threat but a definite and substantiated

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<sup>2</sup> *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423

one. I have already recorded that none of the authorities concerned, in their wisdom, had stated that they anticipated such disturbance to public tranquillity and social order that there was any need for cancellation of the permissions or imposition of a restriction under Section 144 CrPC as late as till 10.40 p.m. on 4-6-2011, which then was sought to be executed forthwith. a

178. There is a direct as well as implied responsibility upon the Government to function openly and in public interest. Each citizen of India is entitled to enforce his fundamental rights against the Government, of course, subject to any reasonable restrictions as may be imposed under law. The Government can, in larger public interest, take a decision to restrict the enforcement of freedom, however, only for a valid, proper and justifiable reason. Such a decision cannot be arbitrary or capricious. b

179. Another important facet of exercise of such power is that such restriction has to be enforced with least invasion. I am unable to understand and, in fact, there is nothing on record which explains the extraordinary emergency that existed on the midnight of 4-6-2011/5-6-2011 which led the police to resort to waking up sleeping persons, throwing them out of the tents and forcing them to disperse using force, cane sticks, tear gas shells and brickbatting. I am also unable to understand as to why this enforcement could not even wait till early next morning i.e. 5-6-2011. This is a very crucial factor and the onus to justify this was upon the State and the police and I have no hesitation in noticing that they have failed to discharge this onus. This decision, whether taken by the police itself or, as suggested by the learned amicus, taken at the behest of the people in power and the Ministry of Home Affairs, was certainly amiss and a decision which is arbitrary and unsustainable, would remain so, irrespective of the number of persons or the hierarchy of the persons in the Government who have passed the said decision. I find no error with the police, to working in tandem or cooperation with the Ministry of Home Affairs, which itself is responsible for maintaining law and order in the country. c d e

180. I also have to notice that as per the stand taken by all the parties before this Court, it remains a fact that no announcement was made on the midnight of 4-6-2011/5-6-2011 to the huge gathering sleeping to disperse peacefully from the Ramlila Maidan. It was an obligation of the police to make repeated announcements and help the people to disperse. The police, admittedly, did not make any such announcements because it anticipated a backlash. Baba Ramdev and other representatives of Respondent 4 also did not make such an announcement, but Baba Ramdev asserted that he would leave only if the people and the followers wanted him to leave. I am unable to appreciate this kind of attitude from both sides. It was primarily an error of performance of duty by both sides and the ultimate sufferer was the public at large. f g

181. It is true and, without hesitation, I notice that the CCTV cameras and other documents do show that some of the police personnel had behaved with courtesy and kindness with the members of the gathering and had even h

a helped them to disperse and leave the Ramlila Maidan. At the same time, some others had misbehaved, beaten the people with brutality and caused injuries to the public present at the Ramlila Maidan. Thus, I cannot blame the entire police force in this regard.

b 182. The learned amicus raised another issue that the Home Secretary, Union of India and the Chief Secretary, Delhi had not filed proper affidavits in relation to the incident. In fact, the Home Secretary did not file any affidavit till this was raised as an issue by the learned counsel appearing for Respondent 4.

c 183. Factually, it is correct. The affidavits filed by the Chief Secretary, Delhi as well as the Home Secretary are not proper in their form and content. The Home Secretary, on the one hand stated that he had taken charge of the post with effect from 21-7-2011, while, on the other, admitted that he had received the report from the Special Commissioner of Police. He further stated that it is not the practice of the Ministry to confirm the grant of such permission. His affidavit is at variance with the affidavit of the Police Commissioner. According to him, the entry of a large number of persons posed a threat to the gathering, such as, likely stampede and entry of unruly elements into the crowd. Both these circumstances, as noticed above, do not stand even remotely to reason.

d 184. Further, I am somewhat surprised at the insensitivity reflected in the following lines stated in the affidavit of the Home Secretary, "I state and submit that the facts suggest that the injuries to a few (out of thousands gathered as per report) are said to have been caused due to minor stampede and that there was no manhandling of women, elderly persons or children. There were three women police officers of the rank of Deputy Commissioner of Police on duty." I have no hesitation in observing that it is the duty of the State to ensure that each and every citizen of the country is protected. Safety of his person and property is the obligation of the State and his right.

e 185. In view of the affidavit filed by the Police Commissioner, where he has owned the entire responsibility for the entire police hierarchy, I do not propose to attach much significance to this contention. According to the Commissioner, he informed the Additional Secretary in the Ministry of Home Affairs of the developments and the latter might have informed the higher authorities in the said Ministry. I also find no need to enter into this controversy because there is no legal impediment or infirmity in Delhi Police working in coordination and consultation with the Ministry of Home Affairs as none of them can absolve themselves of the liability of maintaining social order, public tranquillity and harmony.

f 186. Mr P.H. Parekh, learned Senior Advocate appearing for the Government of NCT of Delhi, submitted that the power to issue an order under Section 144 CrPC is vested in the Assistant Commissioner of Police in terms of the Notification dated 9-9-2010 issued by the Ministry of Home Affairs, Government of India under sub-section (1)(a) of Section 17 of the DP Act. It is further submitted that in terms of Article 239-AA(3)(a), the

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Legislative Assembly of the NCT of Delhi has legislative competence to enact laws on any matter as applicable to the Union Territory except in relation to the fields stated at Schedule VII List II Entries 1, 2 and 18 of the Constitution of India. Thus, the matters relating to police, land and public order do not fall within the legislative and administrative power of the Government of NCT of Delhi. The Home Secretary, in his affidavit, on the other hand, has stated that the Ministry of Home Affairs neither directed nor is consulted by Delhi Police in such police measures which are to be taken with a view to keep the law and order situation under control. He also stated that it is not the practice of the Ministry to confirm the matters of grant of such permissions. a

187. I am unable to see any merit in these submissions or for that matter even the purpose of such submissions. The Ministry of Home Affairs, the Delhi Government and the police are not at cross purposes in relation to the questions of social order and law and order. It is their cumulative responsibility. The lists in the Seventh Schedule to the Constitution are fields of legislation. They are unconnected with the executive action of the present kind. The Ministry of Home Affairs, Union of India is not only responsible for maintaining the law and order but is also the supervisory and controlling authority of the entire Indian Police Services. It is the duty of the Union to keep its citizens secure and protected. Thus, I consider it unnecessary to express any view on this argument advanced by Mr P.H. Parekh. b

*The scope of an order made under Section 144 CrPC, its implications and infirmities with reference to the facts of the case in hand*

188. By reference to various judgments of this Court at the very outset of this judgment, I have noticed that an order passed in anticipation by the Magistrate empowered under Section 144 CrPC is not an encroachment of the freedom granted under Articles 19(1)(a) and 19(1)(b) of the Constitution and it is not regarded as an unreasonable restriction. It is an executive order, open to judicial review. In exercise of its executive power the executive authority, by a written order and upon giving material facts, may pass an order issuing a direction requiring a person to abstain from doing certain acts or take certain actions/orders with respect to certain properties in his possession, if the officer considers that such an order is likely to prevent or tends to prevent obstruction, annoyance or injury to any other person. c

189. On the bare reading of the language of Section 144 CrPC, it is clear that the entire basis of an action under this section is the "urgency of the situation" and the power therein is intended to be availed for preventing "disorder, obstruction and annoyance", with a view to secure the public weal by maintaining public peace and tranquillity. In *Gulam Abbas v. State of U.P.*<sup>25</sup> the Court clearly stated that preservation of public peace and tranquillity is the primary function of the Government and the aforesaid power is conferred on the executive. In a given situation, a private right must give in to public interest. d

25 (1982) 1 SCC 71 : 1982 SCC (Cr) 82 : AIR 1981 SC 2198 e

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190. The Constitution mandates and every Government is constitutionally committed to the idea of socialism, secularism and public tranquillity. The regulatory mechanism contemplated under different laws is intended to further the cause of this constitutional obligation. An order under Section 144 CrPC, though primarily empowers the executive authorities to pass prohibitory orders vis-à-vis a particular facet, but is intended to serve larger public interest. Restricted dimensions of the provisions are to serve the larger interest, which at the relevant time, has an imminent threat of being disturbed. The order can be passed when immediate prevention or speedy remedy is desirable. The legislative intention to preserve public peace and tranquillity without lapse of time, acting urgently, if warranted, giving thereby paramount importance to the social needs by even overriding temporarily, private rights, keeping in view the public interest, is patently inbuilt in the provisions under Section 144 CrPC.
191. Primarily, MCD owns the Ramlila Maidan and, therefore, is holding this property as a public trustee. MCD had given permission to use the Ramlila Maidan for holding yoga shivir and allied activities with effect from 1-6-2011 to 20-6-2011. The police had also granted permission to organise the yoga training session at the Ramlila Maidan for the same period vide its letter dated 25-4-2011. The permission was granted subject to the conditions that there should not be any obstruction to the normal flow of traffic, sufficient number of volunteers should be deployed at the venue of the training camp, permission should be sought from the land owning agency and all other instructions that may be given by the police from time to time should be implemented. Lastly, that such permission could be revoked at any time.
192. Vide letter dated 27-5-2011, the Deputy Commissioner of Police, Central District, had sought clarification from the President of Respondent 4 that the permission had been granted only for holding a yoga training camp for 4000 to 5000 persons, but the posters and pamphlets circulated by the said respondent indicated that they intended to mobilise 25,000 persons to support Baha Ram Dev's indefinite fast at Ramlila Maidan, which was contrary to the permission sought for. Respondent 4, vide letter dated 28-5-2011, reiterated and reaffirmed its earlier letter dated 20-4-2011 and stated that there would be no programme at all, except the residential yoga camp.
193. Keeping in view the facts and the attendant circumstances, the Deputy Commissioner of Police (Central District) vide his letter dated 1-6-2011, informed the office-bearers of Respondent 4 that in view of the current scenario and the law and order situation prevailing, they were required to make adequate arrangements for screening of people visiting the Ramlila Maidan for yoga shivir and directed further arrangements to be made as per the instructions contained in that letter. It was noticed in the letter of the DCP that a specialised tent of an area of 2,50,000 sq ft was to be erected,

a dais was to be constructed and structures erected were to be duly certified from the authorised agency. It was also, inter alia, stated that no provocative speech or shouting of slogan should be allowed and no firearms, lathis or swords should be allowed in the function and the CCTV cameras should also be installed. It was further stated that the Trust was to abide by all the directions issued by the SHO.

194. Again, on 2-6-2011, a letter was written by the Deputy Commissioner of Police noticing certain drawbacks in the arrangements made by the Trust and reiterating the directions passed vide letter dated 1-6-2011. It was required that the Trust should keep the gathering within the permissible limits and make necessary arrangements for checking/frisking of participants and placing of volunteers in requisite areas. It was also indicated that if the compliance is not made, permission shall be subject to review.

195. Certain inputs given by the Special Branch of Delhi Police on 30-5-2011 stated that Baba Ramdev planned to hold indefinite hunger strike along with 30,000 to 35,000 supporters with effect from 4-6-2011, the birth anniversary of Maharana Pratap, at the Ramlila Maidan. As per that report, the protest was on the following issues:

“1. To bring the black money worth Rs 400 lakh crores, which is national property.

2. To demand the legislation of strong Lokpal Bill to remove corruption completely.

3. Removal of foreign governing system in independent India so that everyone can get social and economic justice.”

196. It was further stated that the gathering may exceed 1 lakh. The letter also indicated that some of the workers would straightaway reach Jantar Mantar on 4-6-2011 and would submit memorandum to the President and the Prime Minister of India. Expressing the apprehensions on these outputs, it was indicated in the report as under:

“The volunteers of the said organisations are well dedicated, tech savvy and using laptops in their routine working, with sound financial status of the organisation, the possibility of the gathering of about 1 lakh, as claimed by the organisers, cannot be ruled out.

Any minor incident at the venue not only may affect law and order situation but also may affect peace in the city creating serious law and order problems. Local police, therefore, will have to be extra vigilant. The possibility of some agent provocation or subversive elements attempting to cause disturbance/sabotage by merging with the crowds would also need to be kept in mind. It should also be noted that as per reliable inputs, large congregations continue to remain the top targets of terrorists.”

197. The Special Branch, thus, suggested taking of some precautions like making of adequate security arrangements by the local police, deployment of quick response teams, ambulances, fire tenders, etc. and to deploy sufficient

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number of traffic police personnel to ensure smooth flow of traffic around Raj Ghat, Red Light, Ramlila Maidan, etc. and concluded as under:

- a "Therefore, a sharp vigil, adequate arrangements by local police, PCR, traffic police are suggested at and near Ramlila Ground, RS Flyover, enroute, Jantar Mantar to avoid any untoward incident. Further, Delhi-UP/Haryana Borders need to be sensitised."

- b 198. As is obvious from the above letters and the reports, nobody had suggested cancellation of the permission granted by the land owning authority or the police for continuation of the activity by Respondent 4, though they were aware of all the facts. The Central District of Delhi Police, on 2-6-2011 itself, noticed all the factors and made a report with regard to the police arrangements at the Ramlila Maidan. Amongst others, it stated the following objectives:

- c "1. All the persons will gain entry through DFMDs.  
2. Every person will be searched/frisked thoroughly to ensure the security of VIPs/high dignitaries, government property and general public, etc.  
3. To ensure clear passage to VIPs and their vehicles with the assistance of traffic police.  
d 4. To ensure that the function is held without interruption.  
5. To keep an eye on persons moving in suspicious circumstances.  
6. Briefcases, lighters, matches, bags, umbrellas, tiffin boxes, etc. be prohibited to be taken by the audience inside the ground. Special attention will be paid on minor crackers, inside the ground.  
e 7. The area of responsibility will be thoroughly checked by the zonal/sector officers.  
8. To maintain law and order during the function."

- f 199. In this report itself, it had worked out the details of deployment, patrolling, timing of duties, supervision and assembly points, etc. In other words, on 2-6-2011, the police, after assessing the entire situation, had neither considered it appropriate to cancel the permissions nor to pass an order under Section 144 CrPC. On the basis of the input reports, the Joint Deputy Director, Criminare, had asked for proper security arrangements to be made for Baba Ramdev in furtherance to which the security of Baba Ramdev was upgraded.

- g 200. In furtherance to the permission granted, the yoga shivir was held and a large number of persons participated therein. All went well till 3-6-2011 and it is nobody's case before the Court that any conditions were violated or there was any threat, much less imminent threat, to public peace and tranquillity. The yoga camp carried its activities for those days.

- h 201. As already noticed, Baba Ramdev had also been granted permission to hold a hunger strike/satyagraha at Jantar Mantar on 4-6-2011. The restriction placed was that it should be with a very limited gathering. Further, vide letter dated 26-5-2011, the police had reiterated that the number of

persons accompanying Baba Ramdev should not exceed 200. However, vide letter dated 4-6-2011, the permission granted in relation to holding of dharna at Jantar Mantar was revoked, in view of the security, law and order reasons and due to the large gathering exceeding the number mentioned in the permission given. a

202. Later, on 4-6-2011, the permission to organise yoga training camp at the Ramlila Maidan was also cancelled. It was stated that the activity being in variation to the permission granted and in view of the security scenario of the capital city, it may be difficult for the police to maintain public order and safety. The organisers were further directed that no follower/participant should assemble at the venue or should hold hoardings, etc., on that very date, an order under Section 144 CrPC was passed. The order recited that an information had been received that some people, groups of people may indulge in unlawful activities to disturb the peace and tranquillity in the area of Sub-Division Kamla Market, Delhi and it was necessary to take speedy measures in this regard to save human life, public order, safety and tranquillity. This order was to remain in force for a period of 60 days from the date of its passing. b c

203. During the course of hearing, it was pointed out before this Court that the order withdrawing the permission was passed at 9.30 p.m. At 10.30 p.m., the police went to inform the representatives of Respondent 4 about the withdrawal of permission and subsequently an order under Section 144 CrPC was passed at about 11.30 p.m. The police force arrived at the site at about 1.00 a.m. and the operation to disperse the crowd started at 1.10 a.m. on the midnight of 4-6-2011/5-6-2011. d

204. It was contended by Mr Harish Salve, learned Senior Counsel, that the decision to withdraw permission is an administrative decision taken with political influence. The police is to work in coordination with the Government, including the Ministry concerned and the Union. The order, being an executive order, has been passed bona fide and keeping in view the larger public interest and it is open to Respondent 4 or the affected parties to challenge the said order in accordance with law. It was also urged that this Court may not deal with the merits of the said order, as there is no challenge to these orders. There is no specific challenge raised by Respondent 4 and for that matter by any affected party to the orders of withdrawal of permission and imposition of restrictions under Section 144 CrPC. e f

205. In this view of the matter, it may not be necessary for this Court to examine these orders from that point of view. But the circumstances leading to passing of these orders and the necessity of passing such orders with reference to the facts of the present case is a matter which has to be examined in order to arrive at a final conclusion, as it is the imposition of these orders that has led to the unfortunate occurrence of 4-6-2011. Therefore, while leaving the parties to challenge these orders in accordance with law, if they so desire, I would primarily concentrate on the facts leading to these orders and their relevancy for the purposes of passing necessary orders and directions. g h

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206. Though MCD is the owner of the property in question, but still it has no role to play as far as maintenance of law and order is concerned. The constitutional protection available to the citizens of India for exercising their fundamental rights has a great significance in our Constitution. Article 13 is indicative of the significance that the Framers of the Constitution intended to attach to the fundamental rights of the citizens. Even a law in derogation of the fundamental rights, to that extent, has been declared to be void, subject to the provisions of the Constitution. Thus, wherever the State proposes to impose a restriction on the exercise of the fundamental rights, such restriction has to be reasonable and free from arbitrariness. It is for the Court to examine whether the circumstances which existed at the relevant time were of such imminent and urgent nature that it required passing of a preventive order within the scope of Section 144 CrPC, on the one hand, and on the other, of imposing a restriction on exercise of a fundamental right by Respondent 4 and persons present therein by withdrawing the permissions granted and enforcing dispersal of the gathering at the Ramlila Maidan at such odd hour.
207. At this stage, it will be useful for me to notice another aspect of this case. Baba Ramdev is stated to have arrived in Delhi on 1-6-2011 and four senior Ministers of the UPA Government met him at the airport and attempted to persuade him to give up his anshan in view of the Government's initiative on the issue that he had raised. Efforts were made to dissuade him from going ahead with his hunger strike on the ground that the Government was trying to find pragmatic and practical solution to tackle the agitated issue. Thereafter, as already noticed, a meeting of the Ministers and Baba Ramdev was held at Hotel Claridges. However, this meeting was not successful and certain differences remained unresolved between the representatives of the Government and Baba Ramdev. Consequently, Baba Ramdev decided to continue with his public meeting and hunger strike. Emphasis has been laid on a press release from the Ministry of Home Affairs stating that a decision was taken that Baba Ramdev should not be allowed to organise any protest and, if persisted, he should be directed to be removed from Delhi.
208. These circumstances have to be examined in conjunction with the stages of passing of the orders under Section 144 CrPC in relation to the withdrawal of permission. Without commenting upon the intelligence reports relied upon by the police, the Court cannot lose sight of the fact that even the intelligence agency, the appropriate quarters in the Government, as well as the police itself, had neither recommended nor taken any decision to withdraw the permission granted or to pass an order under Section 144 CrPC, even till 3-6-2011. On the contrary, after taking into consideration various factors, it had upgraded the security of Baba Ramdev and had required the organisers, Respondent 4, to take various other measures to ensure proper security and public order at the Ramlila Maidan.
209. It is nobody's case that the directions issued by the appropriate authority as well as the police had not been carried out by the organisers. It is also nobody's case that the conditions imposed in the letters granting

permission were breached by the organisers at any relevant point of time. Even on 3-6-2011, the Deputy Commissioner of Police, Central District, who was the officer directly concerned with the area in question, had issued a restricted circular containing details of the arrangements, the objectives and the requirements which the deployed forces should take for smooth organisation of the camp at the Ramlila Maidan. The threat of going on a hunger strike extended by Baba Ramdev to personify his stand on the issues raised, cannot be termed as unconstitutional or barred under any law. It is a form of protest which has been accepted, both historically and legally in our constitutional jurisprudence. a b

210. The order passed under Section 144 CrPC does not give any material facts or such compelling circumstances that would justify the passing of such an order at 11.30 p.m. on 4-6-2011. There should have existed some exceptional circumstances which reflected a clear and prominent threat to public order and public tranquillity for the authorities to pass orders of withdrawal of permission at 9.30 p.m. on 4-6-2011. What weighed so heavily with the authorities so as to compel them to exercise such drastic powers in the late hours of the night and disperse the sleeping persons with the use of force, remains a matter of guess. Whatever circumstances have been detailed in the affidavit are, what had already been considered by the authorities concerned right from 25-5-2011 to 3-6-2011 and directions in that behalf had been issued. Exercise of such power, declining the permission has to be in rare and exceptional circumstances, as in the normal course, the State would aid the exercise of fundamental rights rather than frustrating them. c d

211. Another argument advanced on behalf of Respondent 4 by Mr Rani Jethmalani is that the order under Section 144 CrPC is a fraud upon law as it is nothing but abdication of its authority by police at the command of the Home Minister, Mr P. Chidambaram, as is evident from his abovereferred statements. According to him, the order under Section 144 CrPC, on the one hand, does not contain material facts while on the other, issues no directions as contemplated under that provision. Further it is contended that the Intelligence inputs as communicated to the police authorities vide letter dated 3-6-2011 had not even been received by the ACP. e f

212. There is some substance in this submission of Mr Ram Jethmalani. It is clear from Annexure 'J' annexed to the affidavit of the Police Commissioner that the letter of the Joint Deputy Director dated 3-6-2011 referring to threat on Baba Ramdev and asking the police to review and strengthen the security arrangements, was actually received on 6-6-2011 in the office of the Commissioner of Police and on 7-6-2011 in the office of the Joint Commissioner of Police. Thus, it could be reasonably inferred that this input was not within the knowledge of the officer concerned. I do not rule out the possibility of the Intelligence sources having communicated this input to the police authorities otherwise than in writing as well. But that would not make much of a difference for the reason that as already held, the order under Section 144 CrPC does not contain material facts and it is also evident from g h

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a the bare reading of the order that it did not direct Baba Ramdev or Respondent 4 to take certain actions or not take certain actions which is not only the purpose but is also the object of passing an order under Section 144 CrPC.

b 213. Mr Harish Salve, learned Senior Counsel, also contended that the police had neither abdicated its functions nor acted mala fide. The police had taken its decisions on proper assessment of the situation and bona fide. Two further affidavits dated 9-1-2012 and 10-1-2012 were filed on behalf of the police. They were filed by the Additional Deputy Commissioner of Police, Central District and Special Commissioner of Police, Law and Order, Delhi. These affidavits were filed primarily with an effort to clarify the details of the logbook, the position of water cannons, entries and exit of the tent and number of PCR vans, ambulances arranged for evacuation of the gathering. For example, in the logbook dated 5-6-2011 at 2.14 a.m., details have been c mentioned, "Police is arresting Baba Ramdev in which death can be caused". It is stated that this was not the conversation between two police officers as such but one Vipen Batra, who possessed the telephone number 8130868526 and had rung up. The PCR of the police informed them of the above fact. This, in turn, was communicated by Constable No. 8276 of the PCR to the d Constable Sheetal No. 8174 PCR from the phone of one Shri Chander Mohan stating that policemen were beating people in the Ramlila Ground. These explanations may show that it were the messages received by the PCR vans from private people who had left the Ramlila Ground but there is nothing on record to show that these messages or reports to the PCRs were false. In fact, such calls go to substantiate what has been urged by the learned amicus. The e affidavits do not improve the case of the police any further. As far as the question of mala fides is concerned, I have held that this action or order was not mala fide.

f 214. Another important aspect which had been pointed out during the course of hearing is that even the map annexed to this affidavit of the police supports what has been stated on behalf of Respondent 4 that there was only one main entry and exit for the public. The VIP entrance and VVIP entrance cannot be construed as entrance for the common man. The other exits were not operational owing to commotion, goods lying, fire of tear gas shells and standing of vehicles outside which were not permitted to move. This itself is a factor that goes to show that preparedness on the part of the police was not complete in all respects and also that it was not the appropriate time to evict g people from the Ramlila Ground.

h 215. In the affidavit filed by the police, it has been stated that as a large number of persons were expected to gather on the morning of 5-6-2011, it was inevitable for the authorities of the State to enforce the execution of the order under Section 144 CrPC and the withdrawal of permission at the midnight itself. It is also averred that Respondent 4 had made certain misrepresentations to the authorities. Despite query from the authority, they had incorrectly informed that only a yoga camp will be held at the premises



of the Ramlila Maidan, though Baba Ramdev had planned to commence his hunger strike from 4-6-2011 at that place in the presence of a large gathering.

216. This argument, in my view, does not advance the case of the police any further as Baba Ramdev had already started his fast and he, as well as all his followers, were peacefully sleeping when these orders were passed and were sought to be enforced against them. The Trust might not have given the exact and correct information to the police but the police already had inputs from the Intelligence Agencies as well as knowledge on its own that a hunger strike, in presence of large number of people, was to start from 4-6-2011, which, in fact, did start.

217. From the record before this Court, it is not clear as to why the State did not expect obedience and cooperation from Baba Ramdev in regard to execution of its lawful orders, particularly when after withdrawal of the permission for holding dharna at Jantar Mantar, Baba Ramdev had accepted the request of the police not to go to Jantar Mantar with his followers. The attendant circumstances appearing on record as on 3-6-2011 did not show any intention on their part to flout the orders of the authorities or to cause any social disorder or show threat to public tranquillity by their action. The doubts reflected in the affidavits were matters which could have been resolved or clarified by mutual deliberations, as it was done in the past. The directions issued to Respondent 4 on 1-6-2011 were to ensure proper security of all concerned.

218. Material facts, imminent threat and requirement for immediate preventive steps should exist simultaneously for passing any order under Section 144 CrPC. The mere change in the purpose or in the number of persons to be gathered at the Ramlila Maidan simpliciter could hardly be the cause of such a grave concern for the authorities to pass the orders late in the night. In the standing order issued by the police itself, it has been clarified that wherever the gathering is more than 50,000, the same may not be permitted at the Ramlila Maidan, but they should be offered Burari Ground as an alternative. This itself shows that the attempt on the part of the authorities concerned should be to permit such public gathering by allotting them alternative site and not to cancel such meetings. This, however, does not seem to further the case of the State at all inasmuch as, admittedly, when the order was passed and the police came to the Ramlila Maidan to serve the said order, not even 15,000 to 20,000 people were stated to be present in the shamiana/tent. In these circumstances, it appears to me that it was not necessary for the executive authorities and the police to pass orders under Section 144 CrPC and withdraw the permissions. The matter could be resolved by mutual deliberation and intervention by the appropriate authorities.

219. In view of the affidavits having been filed on behalf of Respondent 3, a person of the rank of the Commissioner of Police, Delhi, wherein he has owned the responsibility for the events that have occurred from 1-6-2011 to 4-6-2011/5-6-2011, there is no reason for this Court to attribute any motive to

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the said officer that he had worked and carried out the will of the people in power.

- a 220. At the very commencement of hearing of the case, I had made it clear to the learned counsel appearing for the parties that the scope of the present petition is a very limited one. This Court would only examine the circumstances that led to the unfortunate incident on 4-6-2011, its consequences as well as the directions that this Court is called upon to pass in the peculiar facts and circumstances of the case. Therefore, it is not necessary for this Court to examine certain contentions raised or sought to be raised by the parties as the same may more appropriately be raised in an independent challenge to such orders or claim such other reliefs as they may like to claim by initiating appropriate legal proceedings.

- c 221. This takes me to an ancillary but pertinent question in context of the said "discretion", that is exercisable with regard to the "threat perception", for the purposes of passing an order under Section 144 CrPC. The activities which, though unintended have a tendency to create disorder or disturbance of public peace by resorting to violence, should invite the appropriate authority to pass orders taking preventive measures. The intent or the expected threat should be imminent. Some element of certainty, therefore, should be traceable in the material facts recorded and the necessity for taking such preventive measures. There has to be an objective application of mind to ensure that the constitutional rights are not defeated by subjective and arbitrary exercise of power.

- e 222. Threat perception is one of the most relevant considerations and may differ as per the perspective of different parties. In the facts of the present case, the police have its own threat perception while the Trust has its own point of view in that behalf. As already noticed, according to the police, Baba Ramdev wanted to do anshan, after the negotiations with the Government had failed, which was not the purpose for which the permission had been granted. There was a possibility of the number of persons swelling up to 50,000 or more. There could also be possibility of communal tension as well as a threat to Baba Ramdev's life. These apprehensions are sought to be dispelled by the learned amicus curiae stating that this protest/dharna/anshan is a right covered under the freedom of speech. The Ramlila Maidan has the capacity of 50,000, which number, admittedly, was never reached and the doubts in the minds of the authority were merely speculative. The security measures had been beefed up. Baba Ramdev had been given Z+ security and, therefore, all the apprehensions of the authorities were misplaced, much less that they were real threats to an individual or to the public at large.

- g 223. The perception of the Trust was that they were carrying on their anshan and yoga shivir peacefully, as law-abiding citizens of the country. No complaint had ever been received of any disturbance or breach of public trust. The events, right from January 2011, showed that all the camps and protests organised by the Trust, under the leadership of Baba Ramdev had been completed peacefully, without any damage to person or property and without

any disturbance to anyone. The action of the police in revoking the permissions as well as that of the executive authorities in passing the order under Section 144 CrPC was a colourable exercise of power and was not called for in the facts and circumstances of the case. a

224. It is also not understandable that if the general "threat perception" and likelihood of communal disharmony were the grounds for revoking the permission and passing the order under Section 144 CrPC, then why the order passed under Section 144 CrPC permitted all other rallies, processions which had obtained the police permission to go on in the area of the same police division. The decision, therefore, appears to be contradictory in terms. b

225. There is some merit in the submissions of the learned amicus curiae. Existence of sufficient ground is the sine qua non for invoking the power vested in the executive under Section 144 CrPC. It is a very onerous duty that is cast upon the empowered officer by the legislature. The perception of threat should be real and not imaginary or a mere likely possibility. The test laid down in this section is not that of "merely likelihood or tendency". The legislature, in its wisdom, has empowered an officer of the executive to discharge this duty with great caution, as the power extends to placing a restriction and in certain situations, even a prohibition, on the exercise of the fundamental right to freedom of speech and expression. Thus, in case of a mere apprehension, without any material facts to indicate that the apprehension is imminent and genuine, it may not be proper for the authorities to place such a restriction upon the rights of the citizen. c d

226. At the cost of repetition, I may notice that all the grounds stated were considered at various levels of the Government and the police and they had considered it appropriate not to withdraw the permissions or impose the restriction of Section 144 CrPC even till 3-6-2011. Thus, it was expected of the authorities to show before the Court that some very material information, fact or event had occurred between 3-6-2011 and 4-6-2011, which could be described as the determinative factor for the authorities to change their mind and pass these orders. I am unable to accept the contention of the police that a situation had arisen in which there was imminent need to intervene instantly having regard to the sensitivity and perniciously perilous consequences that may result, if not prevented forthwith. e f

227. The administration, upon taking into consideration the intelligence inputs, threat perception, likelihood of disturbance to public order and other relevant considerations, had not only prepared its planned course of action but also declared the same. In furtherance thereto, the police also issued directions for compliance to the organisers. The authorities, thus, had full opportunity to exercise their power to make a choice permitting continuation and/or cancellation of the programme and thereby prohibit the activity on the Ramlila Maidan. However, in their wisdom, they opted to permit the continuation of the agitation and holding of the yoga shivir, thereby impliedly permitting the same, even in the changed circumstances, as alleged. *Qui non prohibet quod prohibere potest, assentire videtur* (he who does not prohibit when he is able to prohibit assents to it). g h

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228. The authorities are expected to seriously cogitate over the matter in its entirety keeping the common welfare in mind. In my view, the police have not placed on record any document or even affidavits to show such sudden change of circumstances, compelling the authorities to take the action that they took. Denial of a right to hold such meeting has to be under exceptional circumstances and strictly with the object of preventing public tranquillity and public order from being disturbed.

*Reasonable notice is a requirement of Section 144 CrPC*

229. The language of Section 144 CrPC does not contemplate grant of any time for implementation of the directions relating to the prevention or prohibition of certain acts for which the order is passed against the person(s). It is a settled rule of law that wherever provision of a statute does not provide for a specific time, the same has to be done within a reasonable time. Again reasonable time cannot have a fixed connotation. It must depend upon the facts and circumstances of a given case. There may also be cases where the order passed by an Executive Magistrate under Section 144 CrPC requires to be executed forthwith, as delay in its execution may frustrate the very purpose of such an order and may cause disastrous results like rioting, disturbance of public order and public tranquillity, while there may be other cases where it is possible, on the principles of common prudence, that some time could be granted for enforcement and complete implementation of the order passed by the executive authority under Section 144 CrPC. If one reads the entire provision of Section 144 CrPC, then the legislature itself has drawn a distinction between cases of urgency, where the circumstances do not admit to serving of a notice in due time upon the person against whom such an order is directed and the cases where the order could be passed after giving a notice to the affected party. Thus, it is not possible to lay down any straitjacket formula or an absolute proposition of law with exactitude that shall be applicable uniformly to all the cases/situations. In fact, it may not be judicially proper to state such a proposition. It must be left to the discretion of the executive authority, vested with such powers to examine each case on its own merits.

230. Needless to repeat that an order under Section 144 CrPC affects the right vested in a person and it will not be unreasonable to expect the authorities to grant adequate time to implement such orders, wherever the circumstances so permit. Enforcement of the order in undue haste may sometimes cause a greater damage than the good that it expected to achieve.

231. If for the sake of arguments, I would accept the contention of the police that the order withdrawing the permission as well as the order under Section 144 CrPC are valid and had been passed for good reasons, still the question remains as to whether the authorities could have given some reasonable time for implementation/enforcement of the directions contained in the order dated 4-6-2011. It is indisputable and, in fact, is disputed by none that all the persons who had gathered in the tent at the Ramlila Maidan were sleeping when the police went there to serve the order passed under

Section 144 CrPC upon the representatives of the Trust; the order itself having been passed at 11.30 p.m. on 4-6-2011. There are serious disputes raised as to the manner in which the order was sought to be executed by the police. According to Respondent 4 and the learned amicus, it was not executed as per the legal framework provided under the Police Rules and the guidelines issued, whereas according to the police, it adhered to its prescribed procedure. This issue I shall discuss separately. a

232. But at this stage, I may notice that nothing prevented the authorities from making proper announcements peacefully requiring the persons gathered at the Ramlila Maidan to leave for their respective homes early in the morning and before the yoga camp could resume. Simultaneously, they could also have prohibited entry into the Ramlila Maidan, as the same was being controlled by the police itself. No facts or circumstances have been stated which could explain as to why it was absolutely necessary for the police to wake up the people from their sleep and force their eviction, in a manner in which it has been done at the late hours of night. In absence of any explanation and special circumstances placed on record, I have no hesitation in coming to the conclusion that, in the facts of the present case, it was quite possible and even desirable for the authorities concerned to grant a reasonable time for eviction from the ground and enforcement of the orders passed under Section 144 CrPC. Except in cases of emergency or the situation unexceptionally demanding so, reasonable notice/time for execution of the order or compliance with the directions issued in the order itself or in furtherance thereto is the prerequisite. b c d

233. Non-grant of reasonable time and undue haste on the part of the police authorities to enforce the orders under Section 144 CrPC instantaneously had resulted in the unfortunate incident of human irony which could have been avoided with little more patience and control. It was expected of the police authorities to bastion the rights of the citizens of the country. However, undue haste on the part of the police created angst and disarray amongst the gathering at the Ramlila Maidan, which finally resulted in this sad cataclysm. e

*Requirement of police permission and its effect on the right conferred in terms of Articles 19(1)(a) and 19(1)(b) respectively with reference to the facts of the present case* f

234. The contention on behalf of Respondent 4 is that no law requires permission of the police to go on fast and/or for the purposes of holding an agitation or yoga camp. The police, therefore, had no power to cancel such permission. The law is clear that it is the fundamental right of the people to hold such agitation or morchas in the streets and on public land and the police have been vested with no power to place any restriction, much less an unreasonable restriction, upon the exercise of such right. There is no statutory form provided for seeking permission of the police before holding any such public meeting. g h

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235. While relying on the Constitution Bench judgment of this Court in *Himmat Lal*<sup>17</sup>, the contention is that the police cannot be vested with  
a unrestricted and unlimited power for grant or refusal of permission for holding such public functions. In fact, it is stated to be no requirement of law. In the alternative, the contention is that there was no condition imposed by the police for grant of permission, which had been violated. Thus, there was no occasion or justification, not even a reasonable apprehension, for revoking that permission. The imposition of restriction must be preceded by some act  
b or threatening behaviour which would disturb the public order or public tranquillity.

236. The Ramlila Maidan belongs to MCD and they granted the permission/licence to use the said property from 1-6-2011 to 20-6-2011. They having granted the permission/licence to use the said property, never revoked the same. Thus, the police had no jurisdiction to indirectly revoke the  
c permission which they could not directly revoke and evict the persons from the Ramlila Maidan forcibly, by brutal assaults and causing damage to the person and property of the individuals. The permission had been revoked in violation of the principles of natural justice. The submission was sought to be buttressed by referring to Rule 10 of the MCD Rules which requires grant of personal hearing before revocation of a permission granted by MCD.

237. To contra, the contention raised on behalf of Respondent 3, the Commissioner of Police, Delhi, is that there are specific powers vested in the police in terms of the DP Act, the Punjab Police Rules, as applicable to Delhi and the standing orders, according to which the police is obliged to maintain public order and public tranquillity. They are expected to keep a watch on public meetings. There is no act attributable to the police which has impinged  
e upon any democratic rights of the said respondents or the public. The orders passed and the action taken by the police, including withdrawal of permission, was in public interest as weighed against private interest. Since the police, as an important organ of the State administration, is responsible to maintain public order and peace, it will be obligatory upon the persons desirous of holding such public meetings as well as the authorities concerned  
f to associate police and seek their permission for holding such public satyagraha, camp, etc. as safety of a large number of people may be at stake. According to the learned amicus curiae, the withdrawal of permission was for political and mala fide reasons. There existed no circumstances which could justify the withdrawal of permission. In fact, the contention is that possibility of the Government and police working in liaison to prevent Baba Ramdev  
g from holding satyagraha/anshan cannot be ruled out particularly, when there was no threat, much less an imminent threat, to disturb public order or tranquillity justifying the withdrawal of permission.

238. I have already discussed that the term "social order" has a very wide ambit which includes "law and order", "public order" as well as "security of the State". In other words, "social order" is an expression of wide amplitude.  
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<sup>17</sup> *Himmat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 227 : 1973 SCC (Cri) 280

It has a direct nexus to the Preamble of the Constitution which secures justice—social, economic and political—to the people of India. An activity which could affect “law and order” may not necessarily affect public order and an activity which might be prejudicial to public order, may not necessarily affect the security of the State. Absence of public order is an aggravated form of disturbance of public peace which affects the general course of public life, as any act which merely affects the security of others may not constitute a breach of public order. a

239. “Security of the State”, “law and order” and “public order” are not expressions of common meaning and connotation. To maintain and preserve public peace, public safety and public order is unequivocal duty of the State and its organs. To ensure social security to the citizens of India is not merely a legal duty of the State but a constitutional mandate also. There can be no social order or proper State governance without the State performing this function and duty in all its spheres. b

240. Even for ensuring the exercise of the right to freedom of speech and assembly, the State would be duty-bound to ensure exercise of such rights by the persons desirous of exercising such rights as well as to ensure the protection and security of the people i.e. members of the assembly as well as that of the public at large. This tri-duty has to be discharged by the State as a requirement of law for which it has to be allowed to apply the principle of reasonable restriction, which is constitutionally permissible. c

241. Articles 19(1)(a) and 19(1)(b) are subject to the reasonable restrictions which may be imposed on exercise of such right and which are in the interest of sovereignty and integrity of India, security of the State, public order, decency or morality and friendly relations with foreign States. Besides this, such restriction could also relate to contempt of court, defamation or incitement to an offence. Thus, sphere of such restrictions is very wide. While some may be exercising their fundamental rights under Articles 19(1)(a) and 19(1)(b) of the Constitution, others may be entitled to the protection of social safety and security in terms of Article 21 of the Constitution and the State may be called upon to perform these functions in the discharge of its duties under the constitutional mandate and the requirements of the directive principles of State policy. d

242. I have also noticed that in terms of Article 51-A of the Constitution, it is the constitutional duty of every citizen to perform the duties as stated under that article. e

243. The security of India is the prime concern of the Union of India. “Public order” or “law and order” falls in the domain of the State. The Union also has the power to enact laws of preventive detention for reasons connected with the security of the State, maintenance of the public order, etc. I am not entering upon the field of legislative competence but am only indicating entries in the respective lists to show that these aspects are the primary concern, either of the Union or the State Governments, as the case may be and they hold jurisdiction to enact laws in that regard. The Union or f

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- a the State is expected to exercise its legislative power in aid of civil power, with regard to the security of the State and/or public order, as the case may be, with reference to Schedule VII List I Entry 9, List II Entry I and List III Entries 3 and 4 of the Constitution of India.

- b 244. These are primarily the fields of legislation, but once they are read with the constitutional duties of the State under the directive principles with reference to Article 38 where the State is to secure a social order for promotion of welfare of the people, the clear result is that the State is not only expected but is mandatorily required to maintain social order and due protection of fundamental rights in the State.

- c 245. Freedom of speech, right to assemble and demonstrate by holding dharnas and peaceful agitations are the basic features of a democratic system. The people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the Government on any subject of social or national importance. The Government has to respect and, in fact, encourage exercise of such rights. It is the abundant duty of the State to aid the exercise of the right to freedom of speech as understood in its comprehensive sense and not to throttle or frustrate exercise of such rights by exercising its executive or legislative powers and passing orders or taking action in that direction in the name of reasonable restrictions. The preventive steps should be founded on actual and prominent threat endangering public order and tranquillity, as it may disturb the social order. This delegated power vested in the State has to be exercised with great caution and free from arbitrariness. It must serve the ends of the constitutional rights rather than to subvert them.

- e 246. The "law and order" or "public order" are primarily and certainly the concerns of the State. Police, being one of the most important organs of the State, is largely responsible for ensuring maintenance of public security and social order. To urge that the police have no concern with the holding of public meetings would be a misnomer and misunderstanding of law. To discharge its duty, the police organisation of a State is a significant player within the framework of law. In this view of the matter, I may now refer to certain statutory provisions under the relevant Acts or the Rules.

- g 247. Chapter V of the DP Act requires special measures for maintenance of public order and security of State, to be taken by the police. Sections 28 and 29 of the DP Act give power to the police to make regulations for regulating traffic and for preservation of order in public places and to give directions to the public, respectively. Under Section 31 of the DP Act, the police is under a duty to prevent disorder at places of public amusement or public assembly or meetings. Section 36 contemplates that the police is to ensure and reserve streets or other public places for public purposes and empowers it to authorise erecting of barriers in streets. It also is vested with the power to make regulations regulating the conduct or behaviour of persons constituting assemblies or processions on or along with the streets and specifying, in the case of processions, the rules by which and the time and order in which the same may pass.



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248. The power to make regulations relates to regulating various activities including holding of melas and public amusements, in the interest of public order, the general public or morality. Delhi Police has also issued Standing Order 309 in relation to "regulation of processions and rallies" laying down the procedure for making application for grant of permission, its acceptance or rejection and the consequences thereof. This standing order also provides as to how the proceedings in furtherance to an order passed under Section 144 CrPC should be carried out. It further indicates that the entire tilt of the regulation is to grant permission for holding processions or rallies and they need to be accommodated at the appropriate places depending upon the number of persons proposing to attend the said rally or meeting and the nature of the activity that they are expected to carry on. For instance, under clause (h), as Parliament Street and Jantar Mantar cannot accommodate more than 5000 persons, if there is a larger crowd, they should be shifted to the Ramlila Ground and if the crowd is expected to be more than 50,000 and the number of vehicles would accordingly swell up, then it should be shifted to a park or another premises, which can safely accommodate the gathering.

249. The learned Solicitor General appearing for the Union of India argued that the Ministry of Home Affairs had never told the police to take any action. The police only kept the senior officers in the Ministry of Home Affairs informed. What transpired at the site is correctly stated by the police in its affidavit and the extent of judicial review of such action/order is a very narrow one. According to him, the scope of the suo motu petition itself is a very limited one, as is evident from the order of the Court dated 6-6-2011. The statement of the Home Minister relied upon by Respondent 2 as well as referred to by the learned amicus in his submissions has to be read in conjunction with the explanation given by the Minister of Home Affairs soon after the incident. Thus, no fault or error is attributable to the Ministry of Home Affairs. Government of India in relying upon the judgment of this Court in *Babulal Parate*<sup>2</sup>, *Madhu Limaye*<sup>14</sup>, *Amitabh Bachchan Corp. Ltd. v. Mahila Jagran Manch*<sup>26</sup>, *R.K. Garg v. Supt., District Jail*<sup>27</sup> and *Praveen Bhai Thogadia*<sup>19</sup> to contend that the authorities have to be given some leverage to take decisions in such situations. There are sufficient inbuilt safeguards and that the judicial intervention in such executive orders has to be very limited. It is his contention that the present case does not fall in that category.

250. There cannot be any dispute that the executive authorities have to be given some leverage while taking such decisions and the scope of judicial review of such orders is very limited. These propositions of law are to be

<sup>2</sup> *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423

<sup>14</sup> *Madhu Limaye v. Sub-Divisional Magistrate, Monghyr*, (1970) 3 SCC 746

<sup>26</sup> (1997) 7 SCC 91

<sup>27</sup> (1970) 3 SCC 227 : 1971 SCC (Cri) 45

<sup>19</sup> *State of Karnataka v. Praveen Bhai Thogadia*, (2004) 4 SCC 684 : 2004 SCC (Cri) 1387

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a understood and applied with reference to the facts of a given case. It is not necessary for me to reiterate those facts. Suffice it to note that the action of the police was arbitrary. The seven-Judge Bench of this Court in *Madhu Limaye*<sup>1</sup> reiterated with approval the law enunciated in *Babulal Parate*<sup>2</sup> and further held that: (*Madhu Limaye case*<sup>1</sup>, SCC p. 757, para 24)

b "24. ... These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented."

c The fundamental emphasis is on prevention of situation which would lead to disturbance of public tranquillity, however, action proposed to be taken should be one which itself is not likely to generate public disorder and disturb public tranquillity. It should be preventive and not provocative. The police action in the present case led to a terror in the minds of members of the assembly and finally the untoward incident.

d 251. It is also true that a man on the spot and responsible for maintenance of public peace is the appropriate person to form an opinion as contemplated in law. But, here the onus was on the police authorities to show the existence of such circumstances at the spot when, admittedly, all persons were sleeping peacefully. The courts have to realise that the rights of the organisers and other members of the society had to be protected if a law and order situation was created as a result of a given situation.

e 252. The learned Solicitor General is correct in his submissions that the scope of the present suo motu petition is a limited one. But certainly it is not so limited that the Court would neither examine facts nor the law applicable but would accept the government affidavits as a gospel truth. The order dated 6-6-2011 has two distinct requirements. Firstly, relating to the lake of the police authorities. Secondly, circumstances in which such power with brutality and atrocities was asserted against large people who had gathered at the Ramlila Ground.

f 253. While keeping the principles of law in mind, the Court essentially has to deliberate upon these two aspects. I am examining the circumstances which generated or resulted into the unfortunate situation at the Ramlila Ground on the midnight of 4-6-2011/5-6-2011. The statement made by the Home Minister on 8-6-2011 has already been referred by me above. This statement clearly demonstrated the stand of the Government that in the event g Baba Ramdev persisted in his efforts to go on with the fast, he would be removed. The police had been issued appropriate directions under Section 65 of the DP Act to enforce the same. The decision so had also been taken by Delhi Police. The Minister had requested the general public to appreciate the constraints and difficult circumstances under which Delhi Police had to

h. 14 *Madhu Limaye v. Sub-Divisional Magistrate, Monghyr*, (1970) 3 SCC 746

2 *Babulal Parate v. State of Maharashtra*, AIR 1961 SC 884 : (1961) 2 Cri LJ 16 : (1961) 3 SCR 423

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discharge its functions. This statement was even clarified with more reasons and elaborately in the exclusive interview of the Minister with DD News on the same date on the television. He is stated to have said that ultimately when the talks failed or Baba Ramdev went back on his words, the police was told to enforce the decision. a

254. There are circumstances and reasons given by the Home Minister in his statement for making the statement that he made. The decision of Delhi Police in the normal course of events would have a connection with the declaration made by the Ministry. Police might have acted independently or in consultation with the Ministry. Either way, there is no material, before me to hold that the decision of the Ministry or the police was mala fide in law or in fact. Upon taking into consideration the cumulative effect of the affidavits filed on record and other documentary evidence, I am unable to dispel the argument that the decision of the Ministry of Home Affairs, Union of India reflected its shadow on the decision-making process and decision of the police authorities. b c

255. I shall make it clear even at the cost of repetition that neither am I adjudicating upon the validity of the order passed by the Government qua Respondent 4, nor adjudicating any disputes between Baba Ramdev, on the one hand, and the Government, on the other. Within the scope of this Court's order dated 6-6-2011, I would examine all the relevant facts and the principles of law applicable for returning the findings in relation to the interest of the large public present at the Ramlila Maidan in the midnight of 4-6-2011/5-6-2011. d

256. The learned amicus also contended that the doctrine of limited judicial review would not stricto sensu apply to the present case. The case is not limited to the passing of an order under Section 144 CrPC, but involves the larger issue of fundamental freedom and restrictions in terms of Article 19(1)(a) of the Constitution, as well as the interest of a number of injured persons and Rajbala, the deceased. It is also his contention that there is a clear abdication of powers by the police to the Ministry of Home Affairs. The order and action of the police are patently unjustifiable. If the trajectories of two views, one of the Ministry and other of the police point out towards the action being mala fide, be it so, the court then should decide the action to be mala fide. Mala fides is a finding which the court can return only upon proper allegations supported by documentary or other evidence. It is true that if the factual matrix of the case makes the two trajectories (case of both the respondents) point towards an incorrect decision, the court would be reluctant to return a finding of mala fides or abdication of power. The decision was taken by the competent authority and on the basis of inputs and the situation existing at the site. It may be an incorrect decision taken in somewhat arbitrary manner and its enforcement may be totally contrary to the rule of law and common sense. In such an event, the action may be liable to be interfered with but cannot be termed as mala fide. e f g h

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257. Furthermore, the constitutional mandate, the statutory provisions and the regulations made thereunder, in exercise of power of delegated  
a legislation, cast a dual duty upon the State. It must ensure public order and public tranquillity with due regard to social order, on the one hand, while on the other, it must exercise the authority vested in it to facilitate the exercise of fundamental freedoms available to the citizens of India. A right can be regulated for the purposes stated in that article itself.

258. In *Himat Lal K. Shah*<sup>17</sup> this Court observed that even in  
b pre-Independence days the public meetings have been held in open spaces and public streets and the people have come to regard it as a part of their privileges and amenities. The streets and public parks existed primarily for other purposes and the social interest promoted by untrammelled exercise of freedom of utterance and assembly in public streets must yield to the social interest which the prohibition and regulation of speech are designed to  
c protect. There is a constitutional difference between reasonable regulation and arbitrary exclusion. The power of the appropriate authority to impose reasonable regulation, in order to ensure the safety and convenience of the people in the use of public highways, has never been regarded as inconsistent with the fundamental right to assembly. A system of licensing as regards the time and manner of holding public meeting on public streets has not been  
d regarded as an infringement of a fundamental right of public assembly or free speech. This Court, while declaring Rule 7 of the Bombay Police Rules ultra vires, stated the principle that it gave an unguided discretion, practically dependent upon the subjective whims of the authority, to grant or refuse permission to hold public meeting on a public street. Unguided and unfettered power is alien to proper legislation and even good governance. The principles of healthy democracy will not permit such restriction on the  
e exercise of a fundamental right.

259. The contention made by Mr Ram Jethmalani, learned Senior Advocate, is that this judgment should be construed to mean that it is not obligatory or even a directory requirement to take permission of the police authorities for holding such public meetings at public places. According to  
f him the police have no such power in law.

260. I am not quite impressed by this submission. This argument, if accepted, can lead to drastic and impracticable consequences. If the Department of Police will have no say in such matters, then it will not only be difficult but may also be improbable for the police to maintain law and order and public tranquillity, safeguarding the interest of the organisers, the persons participating in such public meetings as well as that of the public at  
g large.

261. I am bound and, in fact, I would follow the view expressed by a Constitution Bench of this Court in *Himat Lal*<sup>17</sup> in para 31 of the judgment: (SCC p. 239)

“31. It seems to us that it follows from the above discussion that in  
h India a citizen had, before the Constitution, a right to hold meetings on

<sup>17</sup> *Himat Lal K. Shah v. Commr. of Police*, (1973) 1 SCC 227 : 1973 SCC (Cr) 280

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public streets subject to the control of the appropriate authority regarding the time and place of the meeting and subject to considerations of public order. Therefore, we are unable to hold that the impugned Rules are ultra vires Section 33(1) of the Bombay Police Act insofar as they require prior permission for holding meetings." a

262. The provisions of the DP Act read in conjunction with the regulations framed and the standing orders issued, do provide sufficient guidelines for exercise of power by the appropriate authority in granting and/or refusing the permission sought for. I hasten to add here itself that an application to the police has to be examined with greatest regard and objectivity in order to ensure exercise of a fundamental right rather than it being throttled or frustrated by non-granting of such permission. b

263. A three-Judge Bench of this Court in *Destruction of Public and Private Properties, In re*<sup>22</sup> primarily laid down the guidelines to effectuate the modalities for preventive action and adding teeth to the enquiry/ investigation in cases of damage to public and private properties resulting from public rioting. The Court indicated the need for participation and for taking the police into the organisational activity for such purposes. The Court, while following the principles stated in *Union of India v. Assn. for Democratic Reforms*<sup>28</sup>, gave directions and guidelines, wherever the Act or the Rules were silent on a particular subject, for the proper enforcement of the provisions. In para 12 of the judgment, the Court clearly stated that as soon as there is a demonstration organised, the organisers shall meet the police to review and revise the route to be taken and lay down the conditions for peaceful march and protest. c d

264. Admittedly, the Court in that case was not determining an issue whether police permission is a prerequisite for holding such public meetings or not, but still, the Court mandated that the view of the police is a requirement for organisation of such meetings or for taking out public processions. Seeking of such permission can be justified on the basis that the said right is subject to reasonable restrictions. e

265. Further, exercise of such rights cannot be claimed at the cost of impinging upon the rights of others. This is how the restriction imposed is to be regulated. Restriction to a right has to come by enactment of law and enforcement of such restriction has to come by a regulatory mechanism, which obviously would take within its ambit the role of police. The police have to perform their functions in the administration of criminal justice system in accordance with the provisions of CrPC and other penal statutes. It has also to ensure that it takes appropriate preventive steps as well as maintains public order or law and order, as the case may be. f g

266. In the event of any untoward incident resulting into injury to a person or property of an individual or violation of his rights, it is the police alone that shall be held answerable and responsible for the consequences as h

22 (2009) 5 SCC 212 : (2009) 2 SCC (Cr) 629 : (2009) 2 SCC (Civ) 451  
28 (2002) 5 SCC 294

- a may follow in law. The police is to maintain and give precedence to the safety of the people as *salus populi suprema lex* (the safety of the people is the supreme law) and *salus reipublicae suprema lex* (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. Besides, one fact that cannot be ignored is that Respondent 4, in furtherance to the understanding of law, had itself applied to the Deputy Commissioner of Police, Central District, Darya Ganj, seeking sanction for holding of yoga shivir at the Ramlila Maidan.

- b 267. It is difficult for the Court to even imagine a situation where the police would be called upon to discharge such heavy responsibility without having any say in the matter. The persons who are organising the public meeting would obviously have their purpose and agenda in mind but the police also have to ensure that they are able to exercise their right to freedom of speech and assembly and, at the same time, there is no obstruction, injury or danger to the public at large.

- c 268. Thus, in my considered opinion, associating police as a prerequisite to hold such meetings, dharnas and protests, on such large scale, would not infringe the fundamental rights enshrined under Articles 19(1)(a) and 19(1)(b) of the Constitution as this would squarely fall within the regulatory mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it would help in ensuring due social order and would also not impinge upon the rights of the others, as contemplated under Article 21 of the Constitution of India. That would be the correct approach of law, as is supported by various judgments and reasoning, that I have detailed in the initial part of this judgment. A solution to such an issue has to be provided with reference to exercise of a right, imposition of reasonable restrictions, without disturbing the social order, respecting the rights of others with due recognition of the constitutional duties that all citizens are expected to discharge.

- d 269. Coming to the facts of the present case, it is nobody's case that the permissions were declined. The permissions, whether for holding of the yoga shivir at the Ramlila Maidan or the protest at Jantar Mantar, were granted subject to certain terms and conditions. The argument that no permission of the police is called for in absolute terms, as a pre-requirement for holding of such meetings, needs no further deliberation.

- e *Responsibility of the Trust, members of the assembly, their status and duty*

- f 270. Once an order under Section 144 CrPC is passed by the competent authority and such order directs certain acts to be done or abstains (*sic* abstention) from doing certain acts and such order is in force, any assembly, which initially might have been a lawful assembly, would become an unlawful assembly and the people so assembled would be required to disperse in furtherance to such order. A person can not only be held responsible for his own act, but, in the light of Section 149 IPC, if the offence

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is committed by any member of the unlawful assembly in prosecution of a common object of that assembly, every member of such assembly would become member of the unlawful assembly.

271. Obedience of lawful orders is the duty of every citizen. Every action is to follow its prescribed course in law *actio quaelibet it sua via*. The course prescribed in law has to culminate to its final stage in accordance with law. In that process there might be either a clear disobedience or a contributory disobedience. In either way, it may tantamount to being negligent. Thus, the principle of contributory negligence can be applied against parties to an action or even a non-party. The rule of identification would be applied in cases where a situation of the present kind arises. Before this Court, it is the stand of the police authorities that Baba Ramdev, members of the Trust and their followers refused to obey the order and, in fact, they created a situation which resulted in inflictment of injuries not only to the members of the public, but even to police personnel. In fact, they placed the entire burden upon Respondent 4.

272. The members of the public as well as Respondent 4 claimed that there was damage to their person and property as a result of the action of the police. Thus, this Court will have to see the fault of the party and the effective cause of the ensuing injury. Also it has to be seen that in the "agony of the moment", would the situation have been different and safe, had the people concerned acted differently and as to who was majorly responsible for creation of such a dilemma. Under the English law, it has been accepted that once a statute has enjoined a pattern of behaviour as a duty, no individual can absolve another from having to obey it. Thus, as a matter of public policy, *volenti* cannot erase the duty or breach of it. (*Ref. Clerk and Lindsell on Torts*, 20th Edn., p. 246)

273. There is no statutory definition of contributory negligence. The concerns of contributory negligence are now too firmly established to be disregarded, but it has to be understood and applied properly. "Negligence" materially contributes to injury or is regarded as expressing something which is a direct cause of the accident. The difference in the meaning of "negligence", when applied to a claimant, on the one hand, and to a defendant on the other, was pointed out by Lord Simon in *Nance v. British Columbia Electric Railway Co. Ltd.*<sup>29</sup> (AC at p. 611):

"... when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the claimant's claim, the principle involved is that,

<sup>29</sup> 1951 AC 601 : (1951) 2 All ER 448 (PC)

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where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

- a 274. The individual guilty of contributory negligence may be the employee or agent of the claimant, so as to render the claimant vicariously responsible for what he did. There could be cases of negligence between spectators and participants in sporting activities. However, in such matters, negligence itself has to be established. In cases of "contributory negligence", it may not always be necessary to show that the claimant is in breach of some duty, but the duty to act carefully, usually arises and the liability in an action could arise. (*Charlesworth and Percy on Negligence*, 11th Edn., pp. 195 and 206) These are some of the principles relating to the award of compensation in cases of contributory negligence and in determining the liability and identifying the defaulter. Even if these principles are not applicable *stricto sensu* to the cases of the present kind, the applied principles of contributory negligence akin to these principles can be applied more effectively on the strength of the provisions of Section 149 IPC.
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- d 275. A negligence could be composite or contributory. "Negligence" does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. "Negligence" is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. Normally, the crucial question on which such a liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. Though, this is the principle stated by this Court in a case relating to the Motor Vehicles Act, 1939 in *Municipal Corpn. of Greater Bombay v. Laxman Iyer*<sup>30</sup>, it is stated that the principle stated therein would be applicable to a large extent to the cases involving the principles of contributory negligence as well.
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- f 276. This Court in *MCD v. Uphaar Tragedy Victims Assn.*<sup>31</sup> while considering awarding of compensation to the victims who died as a result of Uphaar cinema tragedy and the liability of the persons responsible, held that even on the principle of contributory negligence the Delhi Vidyut Board to whom negligence was attributable in relation to installing a transformer was liable to pay damages along with the licensee. Whenever an order is passed which remains unchallenged before the court of competent jurisdiction, then its execution is the obvious consequence in law. For its execution, all concerned are expected to permit implementation of such orders and, in fact, are under a legal obligation to fully cooperate in the enforcement of lawful orders.
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277. Article 19(1)(a) gives the freedom of speech and expression and the right to assembly. Article 21 mandates that no person shall be deprived of his

- h 30 (2003) 8 SCC 731 : 2004 SCC (Cri) 252 : AIR 2003 SC 4182  
31 (2011) 14 SCC 481 : AIR 2012 SC 100



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life and personal liberty except according to the procedure established by law. However, Article 51-A imposes certain fundamental duties on the citizens of India. Article 38(1) provides that:

*"38. State to secure a social order for the promotion of welfare of the people.—(1) The State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life."*

278. Article 51-A requires the citizens of India to abide by the Constitution and to uphold the sovereignty and integrity of India. Article 51-A(i) requires a citizen to safeguard public property and to abjure violence. An order passed under Section 144 CrPC is a restriction on enjoyment of fundamental rights. It has been held to be a reasonable restriction. Once an order is passed under Section 144 CrPC within the framework and in accordance with the requirements of the said section, then it is a valid order which has to be respected by all concerned. Its enforcement is the natural consequence.

279. In the present case, the order was passed under Section 144 CrPC at about 11.30 p.m. whereafter the police had come to the Ramlila Maidan to serve the said order on the representatives of Respondent 4. The video and the footage of CCTV cameras played before this Court show that the officers of the police along with the limited force had come to inform Baba Ramdev and/or the representatives of Respondent 4 about the passing of the said order, but they did not receive the requisite cooperation from that end. On the contrary, it is clear from the various documents before this Court that Baba Ramdev did not receive the order though obviously he had come to know about the said order.

280. At the time of the incident, Baba Ramdev was sleeping in the rest room. Thereafter he came to the stage and when approached by the police officers, who were also present on the stage, he jumped into the crowd, got on to the shoulders of one of his followers and delivered speeches. Of course, there does not appear to be use of any language which was, in any way, provocative or was a command to his followers to get involved in clash with the police. On the contrary, in his speeches, he asked the people to chant the gayatri mantra, maintain shanti and not to take any confrontation with the police. He exhorted that he would not advise the path of hinsa, but at the same time, he also stated about failure of his talks with the Government and the attitude of the Government on the issues that he had raised and also stated that "Babaji will go only if people wanted and the God desires it." After some time, Baba Ramdev climbed on to the stage and thereafter, disappeared. In the CCTV cameras, Baba Ramdev is not seen thereafter. He did not disclose to his followers that he was leaving and what path they should follow. This suspense and commotion on the stage added fuel to the fire. Thereafter, the scenes of violent protest and clash between the police and the followers occurred at the site.

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a 281. The legality and correctness of the order passed under Section 144 CrPC was not challenged by Respondent 4 and, in fact, it remains unchallenged till date. Of course, the attempt on the part of the authorities to enforce the order forthwith, practically frustrated the right available to Respondent 4 under law i.e. preferring of an appeal or a revision under the provisions of CrPC.

b 282. Be that as it may, the fact that when an order was passed by the authorities competent to pass such an order, it was expected of all concerned to respect the order lawfully passed and to ensure that the situation at the site was not converted into a tragedy. All were expected to cooperate in the larger interest of the public. The police was concerned with the problem of law and order while Respondent 4 and Baba Ramdev certainly should have been concerned about the welfare of their followers and the large gathering present at the Ramlila Maidan. Thus, to that extent, the police and Respondent 4 c ought to have acted in tandem and ensured that no damage to the person or property should take place, which unfortunately did not happen.

d 283. Keeping in view the stature and respect that Baba Ramdev enjoyed with his followers, he ought to have exercised the moral authority of his office in the welfare of the people present. There exists a clear constitutional duty, legal liability and moral responsibility to ensure due implementation of lawful orders and to maintain the basic rule of law. It would have served the greater public purpose and even the purpose of the protests for which the rally was being held, if Baba Ramdev had requested his followers to instantaneously leave the Ramlila Maidan peacefully or had assured the authorities that the morning yoga programme or protest programme would be cancelled and the people would be requested to leave for their respective e places. Absence of performance of this duty and the gesture of Baba Ramdev led to an avoidable lacerating episode.

f 284. Even if the Court takes the view that there was undue haste, adamancy and negligence on the part of the police authorities, then also it cannot escape to mention that to this negligence, there is a contribution by Respondent 4 as well. The role of Baba Ramdev at that crucial juncture could have turned the tide and probably brought a peaceful end rather than the heart-rending end of injuries and unfortunate death. Even if it is assumed that the action of the police was wrong in law, it gave no right to others to commit any offence *injuria non excusat injuriam*.

g 285. Every law-abiding citizen should respect the law and must stand in conformity with the rule, be as high an individual may be. Violation of orders has been made punitive under the provisions of Section 188 IPC, but still in other allied proceedings, it would result in fastening the liability on all contributory partners, may be vicariously, but the liability certainly would extend to all the defaulting parties. For these reasons, I have to take a view that in the circumstances of the case, Baba Ramdev and the office-bearers of h Respondent 4 have contributed to the negligence leading to the occurrence in question and are vicariously liable for such action.

*Findings and directions*

286.1. In discharge of its judicial functions, the courts do not strike down the law or quash the State action with the aim of obstructing democracy in the name of preserving democratic process, but as a contribution to the governmental system, to make it fair, judicious and transparent. The courts take care of interests which are not sufficiently defended elsewhere and/or of the victims of State action, in exercise of its power of judicial review. a

286.2. In my considered view, in the facts of the present case, the State and the police could have avoided this tragic incident by exercising greater restraint, patience and resilience. The orders were passed by the authorities in undue haste and were executed with force and overzealousness, as if an emergent situation existed. The decision to forcibly evict the innocent public sleeping at the Ramlila Ground in the midnight of 4-6-2011/5-6-2011, whether taken by the police independently or in consultation with the Ministry of Home Affairs is amiss and suffers from the element of arbitrariness and abuse of power to some extent. The restriction imposed on the right to freedom of speech and expression was unsupported by cogent reasons and material facts. It was an invasion of the liberties and exercise of fundamental freedoms. The members of the assembly had legal protections available to them even under the provisions of CrPC. Thus, the restriction was unreasonable and unwarrantedly executed. The action demonstrated the might of the State and was an assault on the very basic democratic values enshrined in our Constitution. Except in cases of emergency or the situation unexceptionably demanding so, reasonable notice/time for execution of the order or compliance with the directions issued in the order itself or in furtherance thereto is the prerequisite. It was primarily an error of performance of duty both by the police and Respondent 4 but the ultimate sufferer was the public at large. b  
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286.3. From the facts and circumstances that emerge from the record before this Court, it is evident that it was not a case of emergency. The police have failed to establish that a situation had arisen where there was imminent need to intervene, having regard to the sensitivity and perniciously perilous consequences that could have resulted, if such harsh measures had not been taken forthwith. f

286.4. The State has a duty to ensure fulfilment of the freedom enshrined in our Constitution and so it has a duty to protect itself against certain unlawful actions. It may, therefore, enact laws which would ensure such protection. The rights and the liberties are not absolute in nature and uncontrolled in operation. While placing the two, the rule of justice and fair play requires that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness or arbitrariness, resultantly vitiating the law, the procedure and the action taken thereunder. g

286.5. It is neither correct nor judicially permissible to say that taking of police permission for holding of dharmas, processions and rallies of the present kind is irrelevant or not required in law. Thus, in my considered h

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- opinion, the requirement of associating police, which is an important organ of the State for ensuring implementation of the rule of law, while holding
- a such large-scale meetings, dharnas and protests, would not infringe the fundamental rights enshrined under Articles 19(1)(a) and 19(1)(b) of the Constitution. This would squarely fall within the regulatory mechanism of reasonable restrictions, contemplated under Articles 19(2) and 19(3). Furthermore, it would help in ensuring due social order and would also not impinge upon the rights of others, as contemplated under Article 21 of the
  - b Constitution of India. The police authorities, who are required to maintain the social order and public tranquillity, should have a say in the organisational matters relating to holding of dharnas, processions, agitations and rallies of the present kind. However, such consent should be considered in a very objective manner by the police authorities to ensure the exercise of the right to freedom of speech and expression as understood in its wider connotation,
  - c rather than use the power to frustrate or throttle the constitutional right. Refusal and/or withdrawal of permission should be for valid and exceptional reasons. The executive power, to cause a restriction on a constitutional right within the scope of Section 144 CrPC, has to be used sparingly and very cautiously. The authority of the police to issue such permission has an inbuilt element of caution and guided exercise of power and should be in the interest
  - d of the public. Such an exercise of power by the police should be aimed at attainment of fundamental freedom rather than improper suppression of the said right.

- 286.6. I have held that Respondent 4 is guilty of contributory negligence. The Trust and its representatives ought to have discharged their legal and moral duty and should have fully cooperated in the effective implementation
- e of a lawful order passed by the competitive authority under Section 144 CrPC. Due to the stature that Baha Ramdev enjoyed with his followers, it was expected of him to request the gathering to disperse peacefully and leave the Ramlila Maidan. He ought not have insisted on continuing with his activity at the place of occurrence. Respondent 4 and all its representatives were bound by the constitutional and fundamental duty to safeguard public
  - f property and to abjure violence. Thus, there was legal and moral duty cast upon the members of the Trust to request and persuade people to leave the Ramlila Maidan which could have obviously avoided the confrontation between the police and the members of the gathering at the Ramlila Maidan.

- 286.7. As difficult as it is to anticipate the right to any freedom or liberty without any reasonable restriction, equally difficult it is to imagine the
- g existence of a right not coupled with a duty. The duty may be a direct or an indirect consequence of a fair assertion of the right. Part III of the Constitution, although confers rights, duties, regulations and restrictions are inherent thereunder. It can be stated with certainty that the freedom of speech is the bulwark of democratic Government. This freedom is essential for the appropriate functioning of the democratic process. The freedom of speech
  - h and expression is regarded as the first condition of liberty in the hierarchy of liberties granted under our constitutional mandate.

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286.8. It is indisputable that the provisions of Section 144 CrPC are attracted in emergent situations. Emergent power has to be exercised for the purposes of maintaining public order. The material facts, therefore, should demonstrate that the action is being taken for maintenance of public order, public tranquillity and harmony. a

286.9. Even if an order under Section 144 CrPC had to be given effect to, still Respondent 4 had a right to stay at the Ramlila Maidan with permissible number of people as the land owning authority, MCD had not revoked its permission and the same was valid till 20-6-2011. The chain of events reveals that it was a case of police excesses and, to a limited extent, even abuse of power. b

286.10. From the material placed before the Court, I am unable to hold that the order passed by the competent authority and execution thereof are mala fide in law or in fact or is an abdication of power and functions by the police. The action, of course, partially suffers from the vice of arbitrariness but every arbitrary action necessarily need not be mala fide. Similarly every incorrect decision in law or on facts of a given case may also not be mala fide but every mala fide decision would be an incorrect and impermissible decision and would be vitiated in law. Upon taking into consideration the cumulative effect of the affidavits filed on record and other documentary evidence, I am unable to dispel the argument that the decision of the Ministry of Home Affairs, Union of India reflected its shadow on the decision-making process and decision of the police authorities. c d

286.11. I also find that there would be no illegality if the police authorities had acted in consultation with the Union Ministry as it is the collective responsibility of various Departments of the State to ensure maintenance of law and order and public safety in the State. e

286.12. Every person/body to whom such permission is granted, shall give an undertaking to the authorities concerned that he/it will cooperate in carrying out their duty and any lawful orders passed by any competent court/authority/forum at any stage of the commencement of an agitation/dharna/procession and/or period during which the permission granted is enforced. This, of course, shall be subject to such orders as may be passed by the court of competent jurisdiction. f

286.13. Even on the touchstone of the principle of "in terrorem", I am of the view that the police have not acted with restraint or adhered to the principle of "least invasion" with the constitutional and legal rights available to Respondent 4 and the members of the gathering at the Ramlila Maidan. g

286.14. The present case is a glaring example of trust deficit between the people governing and the people to be governed. Greater confidence needs to be built between the authorities in power and the public at large. Thus, I hold and direct that while considering the "threat perception" as a ground for revoking such permissions or passing an order under Section 144 CrPC, "care perception" has to be treated as an integral part thereof. "Care h

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perception" is an obligation of the State while performing its constitutional duty and maintaining social order.

- a 286.15. It is unavoidable for this Court to direct that the police authorities should take such actions properly and strictly in accordance with the guidelines, standing orders and the rules applicable thereto. It is not only desirable but also a mandatory requirement of the present day that the State and the police authorities should have a complete and effective dispersement plan in place, before evicting the gathering by use of force from a particular place, in furtherance to an order passed by an executive authority under Section 144 CrPC.

- b 286.16. This is not a case where the court can come to the conclusion that the entire police force has acted in violation to the Rules, standing orders and has fallen astray in their uncontrolled zeal of forcibly evicting innocent public from the Ramlila Maidan. There has to be a clear distinction between
- c the cases of responsibility of the force collectively and the responsibility of individual members of the forces. I find from the evidence on record that some of the police officers/personnel were very cooperative with the members of the assembly and helped them to vacate the Ramlila Maidan while others were violent, inflicted cane injuries, threw bricks and even used tear gas shells, causing fire on the stage and total commotion and confusion
- d amongst the large gathering at the Ramlila Maidan. Therefore, these two classes of police force have to be treated differently.

- e 286.17. Thus, while directing the State Government and the Commissioner of Police to register and investigate cases of criminal acts and offences, destruction of private and public property against the police officers/personnel along with those members of the assembly, who threw bricks at the police force causing injuries to the members of the force as well as damage to the property, I issue the following directions:

- f 286.17(a) Take disciplinary action against all the erring police officers/personnel who have indulged in brickbattling, have resorted to lathi-charge and excessive use of tear gas shells upon the crowd, have exceeded their authority or have acted in a manner not permissible under the prescribed procedures, Rules or the standing orders and their actions have an element of criminality. This action shall be taken against the officer/personnel irrespective of what ranks they hold in the hierarchy of police.

- g 286.17(b) The police personnel who were present in the pandal and still did not help the evacuation of the large gathering and in transportation of sick and injured people to the hospitals have, in my opinion, also rendered themselves liable for appropriate disciplinary action.

- h 286.17(c) The police shall also register criminal cases against the police personnel and members of the gathering at the Ramlila Ground (whether they were followers of Baba Ramdev or otherwise) who indulged in damage to the property, brickbattling, etc. All these cases have already been reported to Police Station Kamla Market. The police shall complete the investigation and file a report under Section 173 CrPC within three months from today.

286.18. I also direct that the persons who died or were injured in this unfortunate incident should be awarded ad hoc compensation. Smt Rajbala, who got spinal injury in the incident and subsequently died, would be entitled to the ad hoc compensation of Rs 5 lakhs while persons who suffered grievous injuries and were admitted to the hospital would be entitled to compensation of Rs 50,000 each and persons who suffered simple injuries and were taken to the hospital but discharged after a short while would be entitled to a compensation of Rs 25,000 each. a

286.19. For breach of the legal and moral duty and for its contributory negligence, the consequences of financial liability would also pass, though to a limited extent, upon Respondent 4 Trust as well. Thus, I direct that in cases of death and grievous hurt, 25% of the awarded compensation shall be paid by the Trust. The said amount shall be paid to the Commissioner of Police, who in turn, shall issue a cheque for the entire amount in favour of the injured or the person claiming for the deceased. b  
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287. The compensation awarded by this Court shall be treated as ad hoc compensation and in the event, the deceased or the injured persons or the persons claiming through them institute any legal proceedings for that purpose, the compensation awarded in this judgment shall be adjusted in those proceedings.

288. The view expressed by me in this judgment is prima facie and is without prejudice to the rights and contentions of the parties that may be available to them in accordance with law. The suo motu petition is disposed of with above directions while leaving the parties to bear their own costs. d

289. This Court would be failing in its duty if appreciation is not placed on record for the proficient contribution made and adroit assistance rendered by Dr Rajeev Dhavan, learned amicus curiae, Mr R.F. Nariman, learned Solicitor General of India, Mr P.P. Malhotra, learned Additional Solicitor General, Mr Harish N. Salve, Mr P.H. Parekh, Mr Ram Jethmalani, learned Senior Advocates, other learned counsel assisting them and all other counsel appearing in their own right. e

DR B.S. CHAUHAN, J.(concurring)— Having had the advantage of going through the lucid and elaborately discussed judgment of my esteemed Brother Justice Swatanter Kumar, I feel encouraged to contribute to this pronouncement in my own humble way on the precious issues of liberty and freedom, guaranteed to our citizens as fundamental rights under the Constitution and the possible lawful restrictions that can be imposed for curtailing such rights. The legality of the order passed under Section 144 CrPC by the Assistant Commissioner of Police, Kamla Market, Central District, Delhi is also subject to legal scrutiny by me in these proceedings to find out as to whether the said order is in conformity with the provisions of Section 144 CrPC read with Section 134 thereof and Delhi Police Standing Order 309. f  
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291. I respectfully agree with all the observations and the findings recorded by my colleague and I also concur with the observation that the h

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- findings recorded on the sufficiency of reasons in the order dated 4-6-2011 are tentative which could have been challenged if they so desired before the appropriate forum in proper proceedings. Nonetheless, the reservations that I have about State Police action vis-à-vis the incident in question and my opinion on the curtailment of the right of privacy of sleeping individuals has to be expressed as it directly involves the tampering of inviolate rights, that are protected under the Constitution. Proceedings under Section 144 CrPC, even if resorted to on sufficient grounds, the order could not be implemented in such an unruly manner. Such a power is invoked to prevent the breach of peace and not to breach the peace itself.

292. Baba Ramdev along with his large number of followers and supporters performed a shanti paath at about 10 p.m. on 4-6-2011, whereafter, all those who had assembled and stayed back, went to sleep under tents and canopies to again get up in the morning the next day at about 4 a.m. to attend the schedule of ashtang yoga training to be conducted by Baba Ramdev. Just after midnight, at about 12.30 a.m. on 5-6-2011, a huge contingent of about more than a thousand policemen surrounded the encampments while everybody was fast asleep inside. There was a sizeable crowd of about 20,000 persons who were sleeping. They were forcibly woken up by the police, assaulted physically and were virtually thrown out of their tents. This was done in the purported exercise of the police powers conferred under Section 144 CrPC on the strength of a prohibitory order dated 4-6-2011 passed by the Assistant Commissioner of Police as mentioned hereinabove.

293. The manner in which the said order came to be implemented, raised a deep concern about the tyrannical approach of the administration and this Court took cognizance of the incident calling upon the Delhi Police administration to answer this cause. The incident had ushered a huge uproar and an enormous tirade of criticism was flooded, bringing to our notice the said unwarranted police action, that too, even without following the procedure prescribed in law.

294. The question is as to whether such an order stands protected under the restriction clause of Article 19 of the Constitution of India or does it violate the rights of a peaceful sleeping crowd, invading and intruding their privacy during sleep hours. The incident also raises serious questions about the credibility of the police act, the procedure followed for implementation of a prohibitory order and the justification thereof in the given circumstances.

295. The right to peacefully and lawfully assemble together and to freely express oneself coupled with the right to know about such expression is guaranteed under Article 19 of the Constitution of India. Such a right is inherent and is also coupled with the right to freedom and liberty which have been conferred under Article 21 of the Constitution of India.

296. The background in which the said assembly has gathered has already been explained in the judgment delivered by my learned Brother and, therefore, it is not necessary to enter into any further details thereof. The fact



remains that implementation of the promulgated prohibitory orders was taken when the crowd was asleep. The said assembly per se, at that moment, did not prima facie reflect any apprehension of eminent threat or danger to public peace and tranquillity nor was any active demonstration being performed at that dead hour of night. The police, however, promulgated the order on the basis of an alleged information received that peace and tranquillity of that area would be disturbed and people might indulge in unlawful activities. The prohibitory order also recites that conditions exist that unrestricted holding of a public meeting in the area is likely to cause obstruction to traffic, danger to human safety and disturbance of public tranquillity and in order to ensure speedy action for preventing any such danger to human life and safety, the order was being promulgated. a b

297. The order further recites that since the notice for the promulgation cannot be served individually as such it shall be published for information through the press and by affixing the copies on the noticeboard of the office of the police officials, administration and police stations, including the Municipal Corporation offices. c

298. No doubt, the law of social control is preserved in the hands of the State, but at the same time, protection against unwarranted governmental invasion and intrusive action is also protected under the laws of the country. Liberty is definitely no licence and the right of such freedom is not absolute but can be regulated by appropriate laws. The freedom from official interference is, therefore, regulated by law but law cannot be enforced for crippling the freedom merely under the garb of such regulation. The police or the administration without any lawful cause cannot make a calculated interference in the enjoyment of the fundamental rights guaranteed to the citizens of this country. As to what was material to precipitate such a prohibitory action is one aspect of the matter, but what is more important is the implementation of such an order. This is what troubles me in the background that a prohibitory order was sought to be enforced on a sleeping crowd and not a violent one. My concern is about the enforcement of the order without any announcement as prescribed for being published or by its affixation in terms of Delhi Police Standing Order 309 read with Section 134 CrPC. d e f

299. It is believed that a person who is sleeping, is half dead. His mental faculties are in an inactive state. Sleep is an unconscious state or condition regularly and naturally assumed by man and other living beings during which the activity of the nervous system is almost or entirely suspended. It is the state of slumber and repose. It is a necessity and not a luxury. It is essential for optimal health and happiness as it directly affects the quality of life of an individual when awake inducing his mental sharpness, emotional balance, creativity and vitality. g

300. Sleep is, therefore, a biological and essential ingredient of the basic necessities of life. If this sleep is disturbed, the mind gets disoriented and it disrupts the health cycle. If this disruption is brought about in odd hours h

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- preventing an individual from getting normal sleep, it also causes energy disbalance, indigestion and also affects cardiovascular health. These symptoms, therefore, make sleep so essential that its deprivation would result in mental and physical torture both. It has a wide range of negative effects. It also impairs the normal functioning and performance of an individual which is compulsory in day-to-day life of a human being. Sleep, therefore, is a self-rejuvenating element of our life cycle and is, therefore, part and parcel of human life. The disruption of sleep is to deprive a person of a basic priority, resulting in adverse metabolic effects. It is a medicine for weariness which if impeded would lead to disastrous results.

301. Deprivation of sleep has tumultuous adverse effects. It causes a stir and disturbs the quiet and peace of an individual's physical state. A natural process which is inherent in a human being if disturbed obviously affects basic life. It is for this reason that if a person is deprived of sleep, the effect thereof, is treated to be torturous. To take away the right of natural rest is also therefore violation of a human right. It becomes a violation of a fundamental right when it is disturbed intentionally, unlawfully and for no justification.

302. To arouse a person suddenly, brings about a feeling of shock and numbness. The pressure of a sudden awakening results in almost a void of sensation. Such an action, therefore, does affect the basic life of an individual. The state of sleeping is assumed by an individual when he is in a safe atmosphere. It is for this reason that this natural system has been inbuilt by our creator to provide relaxation to a human being. The muscles are relaxed and this cycle has a normal recurrence every night and lasts for several hours. This necessity is so essential that even all our transport systems provide for facilities of sleep while travelling. Sleep is therefore, both, life and inherent liberty which cannot be taken away by any unscrupulous action.

303. An Irish proverb goes on to say that the beginning of health is sleep. The state of sleep has been described by Homer in the famous epic *Iliad* as "sleep is the twin of death". A person, therefore, cannot be presumed to be engaged in a criminal activity or an activity to disturb peace of mind when asleep. Aristotle, the great Greek philosopher has said that all men are alike when asleep. To presume that a person was scheming to disrupt public peace while asleep would be unjust and would be entering into the dreams of that person.

304. I am bewildered to find out as to how such declaration of the intention to impose the prohibition was affected on a sleeping crowd. There may be a reason available to impose prohibitory orders calling upon an assembly to disperse, but to me, there does not appear to be any plausible reason for the police to resort to blows on a sleeping crowd and to throw them out of their encampments abruptly. The affidavits and explanation given do not disclose as to why the police could not wait till morning and provide a reasonable time to this crowd to disperse peacefully. The undue haste caused

a huge disarray and resulted in a catastrophe that was witnessed on media and television throughout the country.

305. I fail to find any explanation for the gravity or the urgent situation requiring such an emergent action at this dark hour of midnight. I, therefore, in the absence of any such justification have no option but to deprecate such action and it also casts a serious doubt about the existence of the sufficiency of reasons for such action. The incident in this litigation is an example of a weird expression of the desire of a tyrannical mind to threaten peaceful life suddenly for no justification. This coupled with what is understood of sleep hereinbefore, makes it clear that the precipitate action was nothing but a clear violation of human rights and a definite violation of procedure for achieving the end of dispersing a crowd.

306. Article 355\* of the Constitution provides that the Government of every State would act in accordance with the provisions of the Constitution. The primary task of the State is to provide security to all citizens without violating human dignity. Powers conferred upon the statutory authorities have to be, perforce, admitted. Nonetheless, the very essence of constitutionalism is also that no organ of the State may arrogate to itself powers beyond what is specified in the Constitution. (Vide *GVK Industries Ltd. v. ITO*<sup>32</sup> and *Nandini Sundar v. State of Chhattisgarh*<sup>33</sup>.)

307. In *Madhav Rao Jivaji Rao Scindia v. Union of India*<sup>34</sup> this Court held that: (SCC p. 131, para 44) even

"in civil commotion, or even in war or peace, the State cannot act 'catastrophically' outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the State".\*\*

308. In *Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.*<sup>35</sup>, this Court held that rule of law means, no one, howsoever high or low, is above the law. Everyone is subject to the law fully and completely as any other and the Government is no exception. Therefore, the State authorities are under a legal obligation to act in a manner that is fair and just. It has to act honestly and in good faith. The purpose of the Government is always to serve the country and ensure public good. (See also *D.K. Basu v. State of W.B.*<sup>36</sup>)

309. Privacy and dignity of human life has always been considered a fundamental human right of every human being like any other key values such as freedom of association and freedom of speech. Therefore, every act which offends or impairs human dignity tantamounts to deprivation pro tanto

\* Ed.: Article 355 imposes a duty on the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution.

32 (2011) 4 SCC 36

33 (2011) 7 SCC 547 : (2011) 2 SCC (L&S) 762 : AIR 2011 SC 2839

34 (1971) 1 SCC 85 : AIR 1971 SC 530

\*\* Ed.: *State of Saurashtra v. Meman Haji Ismail Haji Valimohammed*, AIR 1959 SC 1383 at p. 1387, para 10.

35 (1979) 2 SCC 409 : 1979 SCC (Tax) 144 : AIR 1979 SC 621

36 (1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610

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a of his right to live and the State action must be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. (*Vide Francis Coralie Mullin v. UT of Delhi*<sup>37</sup>.)

b 310. The Constitution does not merely speak of human rights protection. It is evident from the catena of judgments of this Court that it also speaks of preservation and protection of man as well as animals, all creatures, plants, rivers, hills and environment. Our Constitution professes for collective life and collective responsibility on the one hand and individual rights and responsibilities on the other hand. In *Kharak Singh v. State of U.P.*<sup>38</sup> and *Gobind v. State of M.P.*<sup>39</sup> this Court held that right to privacy is a part of life under Article 21 of the Constitution which has specifically been reiterated in *People's Union for Civil Liberties v. Union of India*<sup>40</sup>, wherein this Court held: (*Kharak Singh case*<sup>38</sup>, AIR p. 1302, para 17)

c "17. ... We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview *an invasion on the* part of the police of the sanctity of a man's home and an intrusion into his personal security and his *right to sleep* which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the Preamble to the Constitution that it is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the Framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories."

(emphasis added)

f 311. The citizens/persons have a right to leisure, to sleep, not to hear and to remain silent. The knock at the door, whether by day or by night, as a prelude to a search without authority of law amounts to be police incursion into privacy and violation of fundamental right of a citizen. (See *Wolf v. Colorado*<sup>41</sup>.)

g 312. Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India by this Court. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. Such a right has been extended even to woman of easy virtues as she has been held to be entitled to her right of privacy. However, right of

37 (1981) 1 SCC 608 : 1981 SCC (Cr) 212 : AIR 1981 SC 746

38 AIR 1963 SC 1295 : (1963) 2 Cr LJ 329

h 39 (1975) 2 SCC 148 : 1975 SCC (Cr) 168 : AIR 1975 SC 1378

40 (1997) 1 SCC 301 : AIR 1997 SC 568

41 93 LEd 1782 : 338 US 25 (1949)

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privacy may not be absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right. [Vide *Malak Singh v. State of P&H*<sup>42</sup>, *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>43</sup>, *R. Rajagopal v. State of T.N.*<sup>44</sup>, *People's Union for Civil Liberties v. Union of India*<sup>40</sup>, *Mr 'X' v. Hospital 'Z'*<sup>45</sup>, *Sharda v. Dharmpat*<sup>46</sup>, *People's Union for Civil Liberties v. Union of India*<sup>47</sup>, *District Registrar and Collector v. Canara Bank*<sup>48</sup>, *Bhavesh Jayanti Lakhani v. State of Maharashtra*<sup>49</sup> and *Selvi v. State of Karnataka*<sup>50</sup>.]

313. In *Ram Jethmalani v. Union of India*<sup>51</sup>, this Court dealt with the right of privacy elaborately and held as under: (SCC pp. 35-36, paras 83-84)

"83. Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. ... The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values.

84. ... The notion of fundamental rights, such as a right to privacy as part of right to life, is not merely that the State is enjoined from derogating from them. It also includes the responsibility of the State to uphold them against the actions of others in the society, even in the context of exercise of fundamental rights by those others."

314. The courts have always imposed the penalty on disturbing peace of others by using the amplifiers or beating the drums even in religious ceremonies. [Vide *Rabin Mukherjee v. State of W.B.*<sup>52</sup>, *Burrabazar Fire Works Dealers Assn. v. Commr. of Police*<sup>53</sup>, *Church of God (Full Gospel) in India v. K.K.R. Majestic Colony Welfare Assn.*<sup>54</sup> and *Noise Pollution (7), In re*<sup>55</sup>.] In the later judgment, this Court issued several directions including banning of using the fireworks or fire crackers except between 6.00 a.m. and 10.00 p.m. There shall no use of fire crackers in silence zone i.e. within the

42 (1981) 1 SCC 420 : 1981 SCC (Cr) 169 : AIR 1981 SC 760

43 (1991) 1 SCC 57 : 1991 SCC (Cr) 1 : AIR 1991 SC 207

44 (1994) 6 SCC 632 : AIR 1995 SC 264

40 (1997) 1 SCC 301

45 (1998) 8 SCC 296

46 (2003) 4 SCC 493

47 (2003) 4 SCC 399 : AIR 2003 SC 2363

48 (2005) 1 SCC 496

49 (2009) 9 SCC 551 : (2010) 1 SCC (Cr) 47

50 (2010) 7 SCC 263 : (2010) 3 SCC (Cr) 1 : AIR 2010 SC 1974

51 (2011) 8 SCC 1 : (2011) 3 SCC (Cr) 310

52 AIR 1985 Cal 222

53 AIR 1998 Cal 121

54 (2000) 7 SCC 282 : 2000 SCC (Cr) 1350 : AIR 2000 SC 2773

55 (2005) 8 SCC 796 : AIR 2006 SC 348

RAMLILA MAIDAN INCIDENT, IN RE (*Dr Chauhan, J.*)

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area less than 100 metres around hospitals, educational institutions, courts, religious places.

- a 315. It is in view of this fact that, in many countries there are complete night curfews (at the airport i.e. banning of landing and taking off between the night hours), for the reason that the concept of sound sleep has been associated with sound health which is an inseparable facet of Article 21 of the Constitution. It may also be pertinent to mention here that various statutory provisions prohibit the arrest of a judgment-debtor, a woman in the
- b night and restrain to enter in the night into a constructed area suspected to have been raised in violation of the sanctioned plan, master plan or zonal plan for the purpose of survey or demolition. (See Section 55 of the Code of Civil Procedure, Section 46(4) CrPC, and Sections 25 and 42 of the U.P. Urban Planning and Development Act, 1973.)
- c 316. While determining such matters the crucial issue in fact is not whether such rights exist, but whether the State has a compelling interest in the regulation of a subject which is within the police power of the State. Undoubtedly, reasonable regulation of time, place and manner of the act of sleeping would not violate any constitutional guarantee, for the reason that a person may not claim that sleeping is his fundamental right, and therefore, he has a right to sleep in the premises of the Supreme Court itself or within the
- d precincts of Parliament. More so, I am definitely not dealing herein with the rights of homeless persons who may claim right to sleep on footpath or public premises but restrict the case only to the extent as under what circumstances a sleeping person may be disturbed and I am of the view that the State authorities cannot deprive a person of that right anywhere and at all times.
- e 317. While dealing with the violation of human rights by police officials, this Court in *Jaspal Singh v. State of Punjab*<sup>56</sup>, held as under: (SCC p. 22, para 26)
- f "26. The right to life has rightly been characterised as 'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State'. The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that the State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction."
- g 318. Thus, it is evident that right of privacy and the right to sleep have always been treated to be a fundamental right like a right to breathe, to eat, to drink, to blink, etc.
- h 319. Section 144 CrPC deals with immediate prevention and speedy remedy. Therefore, before invoking such a provision, the statutory authority must be satisfied regarding the existence of the circumstances showing the necessity of an immediate action. The sine qua non for an order under Section 144 CrPC is urgency requiring an immediate and speedy intervention by passing of an order. The order must set out the material facts of the

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situation. Such a provision can be used only in grave circumstances for maintenance of public peace. The efficacy of the provision is to prevent some harmful occurrence immediately. Therefore, the emergency must be sudden and the consequences sufficiently grave. a

320. The disobedience of the propitiatory (*sic* prohibitory) order becomes punishable under Section 188 IPC only "if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed" or "if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause riot or affray". Disobedience of an order promulgated by a public servant lawfully empowered will not be an offence unless such disobedience leads to enumerated consequences stated under the provision of Section 188 IPC. More so, a violation of the propitiatory (*sic* prohibitory) order cannot be taken cognizance of by the Magistrate who passed it. He has to prefer a complaint about it as provided under Section 195(1)(a) CrPC. A complaint is not maintainable in the absence of allegation of danger to life, health or safety or of riot or affray. b

321. Section 144 CrPC itself provides the mode of service of the order in the manner provided by Section 134 CrPC. Section 134 CrPC reads as under:

"134. *Service or notification of order.*—(1) The order shall, if practicable, be served on the person against whom it is made, in the manner herein provided for service of a summons. d

(2) If such order cannot be so served, it shall be notified by proclamation, published in such manner as the State Government may, by rules, direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such persons."

322. Delhi Police Standing Order 309: Regulation of Processions and Rallies prescribe the mode of service of the order passed under Section 144 CrPC, inter alia: e

"309. (5) Arrangement at the place of demonstration should include the following:

(a) Display of banner indicating promulgation of Section 144 CrPC.

(b) At least 2 videographers be available on either side of the demonstration to capture both demonstrators as well as police response/action. f

(c) Location of ambulance/PCR vans for shifting injured persons.

(d) Loud hailers should be available.

(6) Repeated use of PA system, a responsible officer appealing/advising the leaders and demonstrators to remain peaceful and come forward for memorandum/deputation, etc. or court arrest peacefully. Announcements should be videographed. g

(7) If they do not follow appeal and turn violent declare the assembly unlawful on PA system and videograph.

(8) Warning on PA system prior to use of any kind of force must be ensured and also videographed.

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RAMLILA MAIDAN INCIDENT, IN RE (*Dr Chauhan, J.*)

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(13) Special attention be paid while dealing with women's demonstrations—only women police to tackle them."

a 323. The order dated 4-6-2011 passed under Section 144 CrPC reads as under:

"(i) whereas information has been received that some people/groups of people indulge in unlawful activities to disturb the peace and tranquillity in the area of Sub-Division Kamla Market, Delhi;

b (ii) and whereas reports have been received indicating that such conditions now exist that unrestricted holding of public meeting, processions/demonstration, etc. in the area is likely to cause obstruction to traffic, danger to human safety and disturbance of public tranquillity;

(iii) and whereas it is necessary to take speedy measures in this regard to prevent danger to human life, safety and disturbance of public tranquillity;

c (iv) now, therefore, in exercise of the powers conferred upon me by virtue of Section 144, Criminal Procedure Code, 1973 read with Government of India, Ministry of Home Affairs and New Delhi's Notification No. U.11036/1/2010, (i) UTI, dated 9-9-2010, I, Manohar Singh, Assistant Commissioner of Police, Sub-Division Kamla Market, Central District, Delhi do hereby make this written order prohibiting:

\* \* \*

(vi) any person contravening this order shall be liable to be punished in accordance with the provisions of Section 188 of the Penal Code, 1860; and

e (vii) as the notice cannot be served individually on all concerned, the order is hereby passed ex parte. It shall be published for the information of the public through the press and by affixing copies on the noticeboards of the office of all DCPs, Additional DCPs, ACPs, Tehsil officers, all police stations concerned and the offices of NDMC and MCD;

f (viii) religious functions/public meeting, etc. can be held with prior permission, in writing, of the Deputy Commissioner of Police, Central District, Delhi and this order shall not apply to processions which have the requisite permission of the police."

g 324. It is evident from the order passed under Section 144 CrPC itself that the people at large, sleeping in tents, had not been informed about such promulgation and were not asked to leave the place. There had been a dispute regarding the service of the orders on the organisers only. Therefore, there was utter confusion and the gathering could not even understand what the real dispute was and had reason to believe that police was trying to evict Baba Ramdev forcibly. At no point of time, was the assembly declared to be unlawful. In such a fact situation, the police administration is to be blamed for not implementing the order by strict adherence to the procedural requirements. People at large have a legitimate expectation that the executive authority would ensure strict compliance with the procedural requirements

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and would certainly not act in derogation of the applicable regulations. Thus, the present is a clear-cut case of human rights violation.

325. There was no gossip or discussion of something untrue that was going on. To the contrary, it was admittedly an assembly of followers, under a peaceful banner of yogic training, fast asleep. The assembly was at least, purportedly, a conglomeration of individuals gathered together, expressive of a determination to improve the material condition of the human race. The aim of the assembly was *prima facie* unobjectionable and was not to inflame passions. It was to ward off something harmful. What was suspicious or conspiratorial about the assembly, may require an investigation by the appropriate forum, but to my mind the implementation appears to have been done in an unlawful and derogatory manner that did violate the basic human rights of the crowd to have a sound sleep which is also a constitutional freedom, acknowledged under Article 21 of the Constitution of India.

326. Such an assembly is necessarily illegal cannot be presumed, and even if it was, the individuals were all asleep who were taken by surprise altogether for a simultaneous implementation and action under Section 144, CrPC without being preceded by an announcement or even otherwise, giving no time in a reasonable way to the assembly to disperse from the Ramlila Ground. To the contrary, the sleep of this huge crowd was immodestly and brutally outraged and it was dispersed by force making them flee hither and thither, which by such precipitate action, caused a mayhem that was reflected in the media.

327. An individual is entitled to sleep as comfortably and as freely as he breathes. Sleep is essential for a human being to maintain the delicate balance of health necessary for its very existence and survival. Sleep is, therefore, a fundamental and basic requirement without which the existence of life itself would be in peril. To disturb sleep, therefore, would amount to torture which is now accepted as a violation of human right. It would be similar to a third degree method which at times is sought to be justified as a necessary police action to extract the truth out of an accused involved in heinous and cold-blooded crimes. It is also a device adopted during warfare where prisoners of war and those involved in espionage are subjected to treatments depriving them of normal sleep.

328. Can such an attempt be permitted or justified in the given circumstances of the present case? Judicially and on the strength of impartial logic, the answer has to be in the negative as a sleeping crowd cannot be included within the bracket of an unlawful category unless there is sufficient material to brand it as such. The facts as uncovered and the procedural mandate having been blatantly violated, is malice in law and also the part played by the police and the administration shows the outrageous behaviour which cannot be justified by law in any civilised society.

329. For the reasons aforesaid, I concur with the directions issued by my learned colleague with a forewarning to the respondents to prevent any

RAMLILA MAIDAN INCIDENT, IN RE

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repetition of such hasty and unwarranted act affecting the safe living conditions of the citizens/persons in this country.

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(2012) 5 Supreme Court Cases 125

(BEFORE P. SATHASIVAM AND A.K. PATNAIK, JJ.)

RAMLILA MAIDAN INCIDENT, IN RE

b

Suo Motu Writ Petition (Crl.) No. 122 of 2011,  
decided on June 20, 2011

Constitution of India — Art. 32 — Police crackdown on sleeping public — Ramlila Maidan incident of 4-6-2011/5-6-2011 — Sua motu proceedings by Supreme Court — Police version of incident and counter-version, if any, of organisers of public gathering — Opportunity to present, given — Baba Ramdev Trust which organised public gathering impleaded as respondent and affidavit filed by Commissioner of Police, Delhi furnished to Trust to know other side of story (Para 3)

K-D/49568/CR

ORDER

d

1. By an order dated 6-6-2011<sup>1</sup>, the Vacation Bench of this Court directed the Home Secretary, Union of India, the Chief Secretary, Government of NCT of Delhi and the Commissioner of Delhi Police, New Delhi to file personal affidavits explaining the conduct of the police authorities and circumstances in which powers were asserted against a large number of people who had gathered at Ramlila Maidan.

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2. Pursuant to the said notice, the third respondent, the Commissioner of Police, New Delhi has filed counter-affidavit. The second respondent, the Chief Secretary, Government of NCT of Delhi has also filed counter-affidavit stating that during the relevant time, he was out of India. The first respondent, the Union of India is yet to submit its stand.

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3. On going through the stand taken by the third respondent, we intend to hear Acharya Virendra Vikram Bharat Swabhiman Trust, Delhi Pradesh, Arya Samaj, Greater Kailash I, New Delhi. The Trust is made as Respondent 4. Accordingly, we issue notice to the aforementioned Trust. A copy of the counter-affidavit filed on behalf of Respondent 3 without the sealed covers (annexures) shall also be enclosed with the said notice. List on

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11-7-2011.

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<sup>1</sup> *Ramlila Maidan Incident, In re*, Sua Motu Writ Petition (Crl.) No. 122 of 2011, Order dated 6-6-2011 (SC)

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b

# THE SUPREME COURT CASES (2015) 5 SCC

c

(2015) 5 Supreme Court Cases 1

(BEFORE JASTI CHELAMESWAR AND ROHINTON FALI NARIMAN, JJ.)

SHIREYA SINGHAL

Petitioner:

*Versus*

d UNION OF INDIA

Respondent.

Writ Petitions (Crl.) No. 167 of 2012<sup>†</sup> with Nos. 199, 222, 225 of 2013,  
196 of 2014, Writ Petitions (C) Nos. 21, 23, 97, 217 of 2013 and  
758 of 2014, decided on March 24, 2015

e A. Constitution of India — Arts. 19(1)(a) & 19(2) and Preamble —  
Freedom of speech and expression — Scope — Freedom to express  
unpalatable views, cause annoyance, inconvenience or grossly offend, so  
long as it does not amount to incitement leading to imminent causal  
connection with any of the eight subject-matters set out in Art. 19(2) —  
Freedom to express views dissenting with the mores of the day — Held,  
while an informed citizenry is a precondition for meaningful governance,  
the culture of open dialogue is generally of great societal importance — The  
ultimate truth is evolved by “free trade in ideas” in a competitive  
“marketplace of ideas” [see in detail Shortnotes F, G, J, N, P, Q, R, W and X]  
f — Jurisprudence — Truth — Attainment of, via dialectical opposition

g B. Information Technology, Internet, Computer and Cyber Laws —  
Information Technology Act, 2000 — Ss. 66-A, 69-A and 79 —  
Constitutionality — Held, S. 66-A is violative of Art. 19(1)(a) and not saved  
by Art. 19(2) of the Constitution, hence struck down in its entirety —  
S. 69-A is constitutionally valid — S. 79 is also valid subject to S. 79(3)(b)  
being read down — Constitution of India, Arts. 19(1)(a) and 19(2)

h C. Information Technology, Internet, Computer and Cyber Laws —  
Information Technology (Procedure and Safeguards for Blocking for Access  
of Information by Public) Rules, 2009 — Rr. 3 to 10, 14 and 16 — Rules,  
held, constitutionally valid — Constitution of India, Arts. 19(1)(a) and 19(2)

<sup>†</sup> Under Article 32 of the Constitution of India

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D. Information Technology, Internet, Computer and Cyber Laws — Information Technology (Intermediary Guidelines) Rules, 2011 — Rr. 3(2) & (4) — Held, are valid subject to sub-rule (4) being read down — Constitution of India, Arts. 19(1)(a) and 19(2) a

E. Police — Kerala Police Act, 1960 (5 of 1961) — S. 118(d) — Held violative of Art. 19(1)(a) and not saved by Art. 19(2) of the Constitution, hence struck down — Constitution of India, Arts. 19(1)(a) and 19(2)

#### I. SCOPE OF FREEDOM OF SPEECH AND EXPRESSION b

F. Constitution of India — Preamble and Art. 19(1)(a) — Importance of freedom of speech and expression from standpoints of liberty of the individual and democratic form of government — Concept of “free trade in ideas” in competitive “marketplace of ideas”

G. Constitution of India — Arts. 19(1)(a) and 19(2) — Freedom of speech and expression — Content — Concepts of discussion, advocacy and incitement explained and distinguished — Discussion and advocacy are core of freedom of speech and expression and even if they cause annoyance, inconvenience or grossly offend, etc., they cannot be curbed by law — Only when discussion or advocacy reaches level of incitement which tends to have a proximate relation with any of the eight subject-matters set out in Art. 19(2) that law imposing reasonable restrictions on freedom of speech and expression can be validly enacted [see also Shortnotes J, N, P, Q, R, W and X] — Words and Phrases — “Discussion”, “advocacy”, “incitement” — Distinguished — Penal Code, 1860, Ss. 153-A and 295-A c  
d

H. Constitution of India — Arts. 19(1)(a) and 19(2) — Freedom of speech and expression — Content — Compared and contrasted with US First Amendment — Held, both India and the US protect the freedom of speech and expression as well as freedom of the press — Insofar as abridgement and reasonable restrictions are concerned, both Supreme Court of India and the US Supreme Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary — It is only when it comes to the eight subject-matters specified in Art. 19(2) of the Indian Constitution that there is a vast difference — In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster — But in India, such law cannot pass muster if it is merely in the interest of the general public — Such law has to be covered by one of the eight subject-matters set out under Art. 19(2) — If it does not, and is outside the pale of Art. 19(2), Indian courts will strike down such law — Thus, US Court judgments have great persuasive value on content of freedom of speech and expression in India — Constitutional Interpretation — External aids — Foreign decisions — American decisions, reliance upon — Have persuasive value on freedom of speech and expression and of the press under Art. 19(1)(a) of the Constitution e  
f  
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SIREYA SINGHAL v. UNION OF INDIA

3

- a I. Constitution of India — Arts. 19(1)(a) & (2) — Grounds for testing reasonableness of restrictions on freedom of speech and expression, held, cannot be dehors Art. 19(2) — A law restricting freedom of speech and expression cannot pass muster if it is merely in the interest of the general public — Such law has to be covered by one of the eight subject-matters set out under Art. 19(2) — If it does not, and is outside the pale of Art. 19(2), Indian courts will strike down such law

Held :

- b The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. When it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme. The importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government has been recognised by the Supreme Court in its various judgments. Freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. It lies at the foundation of all democratic organisations. Public criticism is essential to the working of its institutions. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance, the culture of open dialogue is generally of great societal importance. The ultimate truth is evolved by "free trade in ideas" in a competitive "marketplace of ideas".

(Paras 8 to 10)

- c *Romesh Thappur v. State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305; *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788; *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299, applied
- e *Abrams v. United States*, 250 US 616 : 63 L Ed 1173 (1919); *Whitney v. California*, 71 L Ed 1095 : 274 US 357 (1927), followed

- f There are three concepts which are fundamental in understanding the reach of freedom of speech and expression, the most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in. It is at this stage that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc. These concepts gain importance here because most of the arguments of both petitioners and respondents tended to veer around the expression "public order". (Para 13)

- g It is significant to notice the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2) of the Indian Constitution. The first important difference is the absoluteness of the US First Amendment—Congress shall make no law which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) of the Indian Constitution speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our

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Constitution such restrictions have to be in the interest of eight designated subject-matters—that is any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2). (Para 15)

Insofar as the first apparent difference is concerned, the US Supreme Court has never given literal effect to the declaration that Congress shall make no law abridging the freedom of speech. That approach of the US Supreme Court continues even today. So far as the second apparent difference is concerned, the American Supreme Court has included “expression” as part of freedom of speech and the Indian Supreme Court has included “the press” as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and the Supreme Court of India have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters specified in Article 19(2) of the Indian Constitution that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. (Paras 16 to 24)

*Chaplinsky v. New Hampshire*, 36 L Ed 1031 : 315 US 568 (1942); *Kameshwar Prasad v. State of Bihar*, 1962 Supp (3) SCR 369 : AIR 1962 SC 1166; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121; *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 : AIR 1962 SC 305; *Supt. Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002, relied on

## II. INFORMATION TECHNOLOGY ACT, 2000 — S. 66-A — CONSTITUTIONALITY

### (1) *Expansive expression “any information”*

J. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — Ss. 66-A and 2(1)(v) — Offence under S. 66-A is made out against persons who disseminate “information” through computer resource or communication device causing “annoyance or inconvenience” to others — Having regard to inclusive and broad definition of “information” in S. 2(1)(v), S. 66-A ropes in all kinds of information disseminated over internet regardless of content of information and irrespective of whether the same falls within realm of discussion or advocacy causing only annoyance, inconvenience, etc. to some (which is permissible), or the same causes incitement leading to imminent causal connection with any of eight subject-matters contained in Art. 19(2) of the Constitution (which is not permissible) — Held, S. 66-A affects right of people to know, hence violates Art. 19(1)(a) of the Constitution beyond the extent permissible under Art. 19(2) — Hence, struck down in its entirety [see also Shortnotes G, N, P, Q, R, W and X]

*Held :*

- a Section 66-A of the IT Act, 2000 casts the net very wide—all information that is disseminated over the internet is included within its reach. The definition of information in Section 2(1)(v) is an inclusive one. Further, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. Thus the public's right to know is directly affected by Section 66-A of the IT Act, 2000. Information of all kinds is roped in—such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know—the marketplace of ideas—which the internet provides to persons of all kinds is what attracts Section 66-A of the IT Act, 2000. That the information sent has only to be annoying, inconvenient, grossly offensive, etc., to attract Section 66-A also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some on the one hand, and, incitement by which such words lead to an imminent causal connection with public disorder, security of State, etc., i.e. any of the eight subject-matters enumerated in Article 19(2) of the Constitution on the other. Section 66-A of the IT Act, 2000 in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66-A of the IT Act, 2000. (Para 21)
- b
- c
- d

*American Communications Assn. v. Douds*, 94 L Ed 925 : 339 US 382 (1950), relied on

**(2) Reasonableness of restriction and infringement of Article 14**

- K. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Unreasonable restriction — Wider reach and range of circulation over internet, held, cannot justify restriction of freedom of speech and expression on that ground alone dehors the standard tests applicable under Art. 19(2) of the Constitution — If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right — The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial — The virtues of the electronic media cannot become its enemies — It may warrant a greater regulation over licensing and control and vigilance on the content — However, this control can only be exercised within the framework of Art. 19(2) — Though a distinction may validly be made between print and other media as opposed to the internet (see Shortnote M, below), S. 66-A being so widely drafted fails in being a reasonable restriction on the freedom of speech and expression — S. 66-A contrasted with S. 69-A — Nor does S. 66-A have a nexus with any of the eight subject-matters set out in Art. 19(2) [see Shortnotes N, O, P, Q, R and S] — S. 66-A fails to meet these standard tests and hence, is struck down
- e
- f
- g

- L. Constitution of India — Arts. 19(1)(a) & (2) — Wider range of reach and range of circulation of information through a particular medium, held, is not an independent ground dehors Art. 19(2) on which freedom of speech and expression can be abridged
- h

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M. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Discrimination — Intelligible differentia between speech and expression on the internet and medium of print, broadcast, real live speech, etc. exists — Hence, creation of new category of criminal offence under S. 66-A is not violative of Art. 14 on the ground that it pertains to a different medium — However, S. 66-A struck down as it did not fall within Art. 19(2)

Held :

If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content. However, this control can only be exercised within the framework of Article 19(2) of the Constitution. To plead for other grounds is to plead for unconstitutional measures.

(Para 32)

*Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal.* (1995) 2 SCC 161. *applied*

There are intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear—the internet gives any individual a platform which requires very little or no payment through which to air his views. Something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject-matter of challenge in these petitions. There is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation.

(Para 102)

A distinction may be made between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved—that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has to be repelled on this ground. However, there is nothing in the features of how information may be disseminated on the internet outlined by the State (and set out in para 30) that warrant any relaxation in the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a section creating a new offence, such as Section 69-A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests applicable under Article 19(2) of the Constitution.

(Paras 26 to 32)

*Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal.* (1995) 2 SCC 161; *Chintaman Rao v. State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118; *State of Madras v. V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966. *applied*

*N.B. Khare v. State of Delhi*, 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Cri LJ 550; *Mohd. Faruk v. State of M.P.*, (1969) 1 SCC 853, *relied on*



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*(3) Whether Section 66-A of the IT Act, 2000 can be protected under heads of public order, defamation, incitement to an offence and decency or morality*

- a On the challenge to Section 66-A of the IT Act, 2000 on ground that the offence created by the said section has no proximate relation with any of the eight subject-matters contained in Article 19(2) of the Constitution, the State claimed that the said section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.
- (i) *Public order*
- b N. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Held, has no proximate relation with “public order” within the meaning of the expression used in Art. 19(2) of the Constitution — It intends to punish person who disseminates “any information” through the internet irrespective of whether to the community at large or to an individual — Information sent may cause annoyance to others and thereby constitute offence under S. 66-A but without any tendency to disrupt public order — Hence, S. 66-A fails the proximity test [see also Shortnotes G, J, P, Q, R, W and X] — Constitution of India — Art. 19(2) — “Public order” — Meaning and connotation — Test for determining disruption or likely disruption of public order — Words and Phrases — “Public order”
- c Held :
- d Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. The test to determine whether public order is disrupted or has tendency to disrupt, is, does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed?
- e Going by this test, it is clear that Section 66-A of the IT Act, 2000 is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66-A of the IT Act, 2000. The recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this section is concerned, save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message. It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. Section 66-A of the IT Act, 2000 makes no distinction between mass dissemination and dissemination to one person. Further, Section 66-A of the IT Act, 2000 does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent—there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. On all these counts, it is clear that Section 66-A of the IT Act, 2000 has no proximate relationship to public order whatsoever. Mere “annoyance” need not cause disturbance of public order. Under Section 66-A of the IT Act, 2000, the offence is complete by sending a message for the purpose of causing annoyance, either “persistently” or otherwise without in any manner impacting public order.
- f
- g
- h

(Paras 37 and 38)

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*Ram Manohar Lohia v. State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608; *Supt., Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002; *Arun Ghosh v. State of W.B.*, (1970) 1 SCC 98 : 1970 SCC (Cri) 67, applied

a

*Romesh Thappar v. State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514; *Brij Bhushan v. State of Delhi*, 1950 SCR 605 : AIR 1950 SC 129 : (1950) 51 Cri LJ 1525, considered

*Pushkar Mukherjee v. State of W.B.*, (1969) 1 SCC 10, cited

(ii) *Test of clear and present danger to public order/Tendency to create public disorder*

b

O. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Dissemination of information punishable under, held is not of such nature as to create clear and present danger to public order or tendency to create public disorder — Constitution of India — Art. 19(2) — Public order — Tendency to affect — Test of clear and present danger — Words and Phrases — “Clear and present danger”, “tendency to create”

c

*Held :*

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that the legislature has a right to prevent. It is a question of proximity and degree. This test of “clear and present danger” has been used by the US Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied. Echoes of it can be found in Indian law as well such as in *S. Rangarajan*, (1989) 2 SCC 574. The Supreme Court in some other cases has used the expression “tendency” to create immediate public disorder. (Paras 39 to 41)

d

*Schenck v. United States*, 63 L Ed 470 : 249 US 47 (1919); *Terminiello v. Chicago*, 93 L Ed 1131 : 337 US 1 (1949); *Brandenburg v. Ohio*, 23 L Ed 2d 430 : 395 US 444 (1969); *Virginia v. Black*, 155 L Ed 2d 535 : 538 US 343 (2003); *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574; *State of Bihar v. Shailabala Devi*, 1952 SCR 654 : AIR 1952 SC 329 : 1952 Cri LJ 1373; *Ramji Lal Modi v. State of U.P.*, 1957 SCR 860 : AIR 1957 SC 620 : 1957 Cri LJ 1006; *Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103; *Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130, followed

e

*Abrams v. United States*, 250 US 616 : 63 L Ed 1173 (1919), relied on

*Gompers v. Buck's Stove & Range Co.*, 221 US 418 : 31 S Ct 492 : 55 L Ed 797 : 34 LRA (NS) 874 (1911); *Virginia v. Black*, 155 L Ed 2d 535 : 538 US 343 (2003); *Watts v. United States*, 221 L Ed 2d 664 : 394 US 705 (1969), cited

f

Viewed from either the standpoint of the clear and present danger test or the tendency to create public disorder test, Section 66-A of the IT Act, 2000 would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates. (Para 44)

g

(iii) *Defamation*

P. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Not aimed at defamatory statements at all — Not concerned with injury to reputation which is the essential ingredient for something to be defamatory — Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation — Penal Code, 1860 — S. 499 — Defamation —

h

Essential ingredient of — Injury to reputation — Constitution of India —  
Art. 19(2) — Words and Phrases — “Defamation” (Para 46)

a (iv) *Incitement to an offence*

Q. Information Technology, Internet, Computer and Cyber Laws —  
Information Technology Act, 2000 — S. 66-A — Has no proximate  
connection with incitement to commit an offence — Constitution of India —  
Art. 19(2) — Incitement to commit an offence — Words and Phrases —  
“Incitement to an offence” — Distinguished from causing of annoyance,

b inconvenience, danger, etc., or being grossly offensive or having a menacing  
character [see also Shortnotes G, J, N, P, R, W and X]

*Held:*

Section 66-A of the IT Act, 2000 has no proximate connection with  
incitement to commit an offence. Firstly, the information disseminated over the  
internet need not be information which “incites” anybody at all. Written words  
may be sent that may be purely in the realm of “discussion” or “advocacy” of a  
“particular point of view”. Further, the mere causing of annoyance,  
inconvenience, danger, etc., or being grossly offensive or having a menacing  
character are not offences under the Penal Code at all. They may be ingredients  
of certain offences under the Penal Code but are not offences in themselves. For  
these reasons, Section 66-A of the IT Act, 2000 has nothing to do with “incitement  
to an offence”. (Para 47)

d As Section 66-A of the IT Act, 2000 severely curtails information that may be  
sent on the internet based on whether it is grossly offensive, annoying,  
inconvenient, etc. and being unrelated to any of the eight subject-matters under  
Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved  
under Article 19(2), is declared as unconstitutional. (Para 47)

(v) *Decency and morality*

e R. Information Technology, Internet, Computer and Cyber Laws —  
Information Technology Act, 2000 — S. 66-A — Offence contemplated  
under, does not fall within the expression “decency” or “morality” —  
Constitution of India — Art. 19(2) — Decency or morality — Words and  
Phrases — “Obscenity” — What may be grossly offensive or annoying  
under S. 66-A need not be obscene at all

f *Held:*

What has been said with regard to public order and incitement to an offence  
equally applies here. Section 66-A of the IT Act, 2000 cannot possibly be said to  
create an offence which falls within the expression “decency” or “morality” in  
that what may be grossly offensive or annoying under Section 66-A of the IT  
Act, 2000 need not be obscene at all—in fact the word “obscene” is conspicuous  
by its absence in Section 66-A of the IT Act, 2000. (Para 50)

g *Directorate General of Doordarshan v. Anand Patwardhan*, (2006) 8 SCC 433; *Aveek  
Sarkar v. State of W.B.*, (2014) 4 SCC 257 : (2014) 2 SCC (Cri) 291, *relied on*  
*Ranjit D. Udeshi v. State of Maharashtra*, (1965) 1 SCR 65 : AIR 1965 SC 881 : (1965) 2  
Cri LJ 8, *considered*

*R. v. Hicklin*, (1868) LR 3 QB 360, *held, distinguished*

h *Director of Public Prosecutions v. Collins*, (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL);  
*Connolly v. Director of Public Prosecutions*, (2008) 1 WLR 276 : (2007) 2 All ER 1012;  
*Terminiello v. Chicago*, 93 L Ed 1131 : 337 US 1 (1949); *Brandenburg v. Ohio*, 23 L Ed  
2d 430 : 395 US 444 (1969); *Whitney v. California*, 71 L Ed 1095 : 274 US 357 (1927);

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*Chaplinsky v. New Hampshire*, 36 L Ed 1031 : 315 US 568 (1942); *Hustler Magazine Inc. v. Falwell*, 485 US 46 : 99 L Ed 2d 41 (1988), referred to

(vi) Interpretation — Reading into Section 66-A of the IT Act, 2000 the eight subject-matters contained in Article 19(2) of the Constitution a

S. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Interpretation to save constitutionality — Court cannot read into S. 66-A the eight subject-matters enumerated in Art. 19(2) of the Constitution when legislature never intended to do so — Constitution of India — Art. 19(2) — Eight subject-matters contained in Cl. (2) cannot be read into a statutory provision when legislature did not intend the same b

T. Interpretation of Statutes — Subsidiary Rules — Construction to save constitutionality of statute — Court cannot read into a provision something or add something which is not there, to save its constitutionality, when legislature never intended to do so — Doing so would be doing violence to language of the provision and wholesale substitution of the provision — Which is not the same as reading down a provision to save it c  
Held :

It is not possible to read into Section 66-A of the IT Act, 2000 each of the subject-matters contained in Article 19(2) in order to save its constitutionality. The reason is that when the legislature intended to do so, it provided for some of the subject-matters contained in Article 19(2) in Section 69-A. The Court would be doing complete violence to the language of Section 66-A of the IT Act, 2000 if it reads into it something that was never intended to be read into it. (Para 51) d

Further, the State submitted that the statute should be made workable by reading into Section 66-A of the IT Act, 2000 several matters suggested by it. But that is also not possible since what the State is asking the Court to do is not to read down Section 66-A of the IT Act, 2000, instead, it is asking for a wholesale substitution of the provision which is obviously not possible. (Para 52) e

#### (4) Vagueness

U. Constitution of India — Arts. 19(2) & 19(1)(a) and Art. 14 — Penal law restricting freedom of speech and expression liable to be struck down for vagueness and not providing manageable standards — A law restricting freedom of speech is rendered unconstitutional on ground of vagueness, when it lacks reasonable and manageable standards and clear guidance for citizens, authorities and courts for drawing a precise line between allowable and forbidden speech, expression or information — When a law uses vague expressions capable of misuse or abuse without providing notice to persons of common intelligence to guess their meaning, it leaves them in a boundless sea of uncertainty, conferring wide, unfettered powers on authorities to curtail freedom of speech and expression arbitrarily — Criminal Law — Requirements of valid penal law or penal provisions — Need for offences to be clearly defined with manageable standards f

V. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A and Ss. 66 & 66-B to 67-B — S. 66-A, held, is unconstitutional on ground of being vague and not providing manageable standards — Contrasted with more clearly defined offences in S. 66 and Ss. 66-B to 67-B of IT Act and in the Penal Code — g h

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- Expressions used in S. 66-A are open-ended, undefined and vague as a result of which neither would accused be put on notice nor would authorities be clear as to on which side of a clearly drawn line a particular communication would fall — Expressions used in S. 66-A are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence — Though some of the expressions used in S. 66-A also occur in certain provisions of the Penal Code, but those expressions used therein are well defined and are ingredients of certain offences, whereas the same used in S. 66-A are offences in themselves and none of them are defined — S. 66-A arbitrarily, excessively and disproportionately invades right of free speech and upsets balance between such right and reasonable restrictions that may be imposed on such right — Constitution of India — Arts. 19(1)(a) and 19(2)

- Penal Code, 1860 — Ss. 268, 294 and 510 — Held, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all — They may be ingredients of certain offences under the Penal Code but are not offences in themselves

Held :

- Where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. A penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place. The Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and decide who could be held guilty. (Paras 55 to 68)

- Musser v. Utah*, 92 L Ed 562 : 68 S Ct 397 : 333 US 95 (1948); *Winters v. New York*, 92 L Ed 840 : 333 US 507 (1948); *Burstyn v. Wilson*, 96 L Ed 1098 : 343 US 495 (1952); *Chicago v. Morales*, 527 US 41 : 144 L Ed 2d 67 (1999); *United States v. Reese*, 92 US 214 : 23 L Ed 563 (1876); *Grayned v. Rockford*, 33 L Ed 2d 222 : 408 US 104 (1972); *Reno v. American Civil Liberties Union*, 521 US 844 : 138 L Ed 2d 874 (1997); *Federal Communications Commission v. Fox Television Stations Inc.*, 132 S Ct 2307 : 183 L Ed 2d 234 (2012); *State of M.P. v. Baldeo Prasad*, (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cr LJ 442; *K.A. Abbas v. Union of India*, (1970) 2 SCC 780; *Harakchand Rotanchand Bantlia v. Union of India*, (1969) 2 SCC 166; *A.K. Roy v. Union of India*, (1982) 1 SCC 271 : 1982 SCC (Cri) 152; *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899, *relied on*

- The expressions used in Section 66-A of the IT Act, 2000 are completely open-ended and undefined whereas in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expressions "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66-A of the IT Act, 2000. The provisions contained in Sections 66-B up to 67-B also provide for various punishments for offences that are clearly made out. (Paras 72 to 74)

The mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code, 1860 at all. They may be ingredients of certain offences under the Penal Code, 1860 but are not offences in themselves (Para 47)

In the Penal Code, 1860 a number of the expressions that occur in Section 66-A of the IT Act, 2000 occur in Section 268 IPC. Whereas, in Section 268 IPC the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66-A of the IT Act, 2000. Further, under Section 268 IPC, the person should be guilty of an act or omission which is illegal in nature—legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression “annoyance” appears also in Sections 294 and 510 IPC. The annoyance that is spoken of in Section 294 IPC is clearly defined—that is, it has to be caused by obscene utterances or acts. Equally, under Section 510 IPC, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66-A of the IT Act, 2000 which in stark contrast uses completely open-ended, undefined and vague language. None of the expressions used in Section 66-A of the IT Act, 2000 are defined. Even “criminal intimidation” is not defined—and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.

(Paras 75 to 78)

Further, every expression used in Section 66-A of the IT Act, 2000 is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression “persistently” is completely imprecise—suppose a message is sent thrice, can it be said that it was sent “persistently”? Does a message have to be sent (say) at least eight times, before it can be said that such message is “persistently” sent? There is no demarcating line conveyed by any of these expressions.

(Para 79)

Two English judgments — *Collins*, (2006) 1 WLR 2223 and *Chambers*, (2013) 1 WLR 1833 would illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge’s notion of what is “grossly offensive” or “menacing”. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as “grossly offensive” or “menacing” used in Section 66-A of the IT Act, 2000 are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A of the IT Act, 2000 and the authorities who are to enforce Section 66-A of the IT Act, 2000 have absolutely no manageable standard by which to book a person for an offence under Section 66-A of the IT Act, 2000.

(Paras 82 and 85)

*Director of Public Prosecutions v. Collins*, (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL);

*Chambers v. Director of Public Prosecutions*, (2013) 1 WLR 1833, considered

*Director of Public Prosecutions v. Collins*, (2006) 1 WLR 308 : (2005) 3 All ER 326, referred to

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- Thus it is clear that Section 66-A of the IT Act, 2000 arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right. (Para 86)

*Chintaman Rao v. State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118; *State of Madras v. V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cri LJ 966, *applied*

- The submission that though expressions that are used in Section 66-A of the IT Act, 2000 may be incapable of any precise definition but for that reason they are not constitutionally vulnerable, is not acceptable. (Para 80)

- Madan Singh v. State of Bihar*, (2004) 4 SCC 622 : 2004 SCC (Cri) 1360; *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*, (2010) 5 SCC 246; *State of M.P. v. Kedia Leather & Liquor Ltd.*, (2003) 7 SCC 389 : 2003 SCC (Cri) 1642; *State of Karnataka v. Appa Balu Ingale*, 1995 Supp (4) SCC 469 : 1994 SCC (Cri) 1762, *distinguished*

(5) Chilling effect and Overbreadth

- W. Constitution of India — Arts. 19(1)(a) & (2) and Preamble —  
c Freedom of speech and expression — Scope — Freedom to express unpalatable views, cause annoyance, inconvenience or grossly offend so long as it does not amount to incitement leading to imminent causal connection with any of the eight subject-matters set out in Art. 19(2) — Freedom to express views dissenting with the mores of the day [see also Shortnotes G, J, N, P, Q, R and X]

- d X. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Restriction on freedom of speech and expression must be couched in the narrowest possible terms to avoid chilling effect on such freedom — Expressions used in S. 66-A of the IT Act, 2000 are very wide and terms of inexactitude, capable of taking within its sweep even protected and innocent speech, and the question as to whether the offence is made out thereunder depends upon uncertain factors  
e — Thus S. 66-A of the IT Act, 2000 is liable to be used in such a way as to have chilling effect on the right under Art. 19(1)(a) and liable to be struck down on ground of overbreadth [see also Shortnotes G, J, N, P, Q, R, U, V and W] — Constitution of India — Art. 19(1)(a) — Words and Phrases — “Chilling effect”

- f Y. Constitution of India — Arts. 19(1)(a) & (2) — Restrictions on the freedom of speech must be couched in the narrowest possible terms  
Held :

- The content of the right under Article 19(1)(a) remains the same whatever be the means of communication including internet communication. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A certain section of a particular community may be grossly  
h offended or annoyed by communications over the internet by “liberal views” — such as the emancipation of women or the abolition of the caste system or

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whether certain members of a non-proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66-A of the IT Act, 2000. In point of fact, Section 66-A of the IT Act, 2000 is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and is liable, therefore, to be used in such a way as to have a chilling effect on freedom of speech. If its constitutionality is upheld, the chilling effect on free speech would be total.

(Paras 90, 87 and 94)

*Reno v. American Civil Liberties Union*, 521 US 844 : 138 L Ed 2d 874 (1997); *Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161, followed

*R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632; *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299, relied on

*New York Times Co. v. Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964); *Derbyshire County Council v. Times Newspapers Ltd.*, 1993 AC 534 : (1993) 2 WLR 449 : (1993) 1 All ER 1011 (11L); *Attorney General v. Guardian Newspapers Ltd. (No. 2)*, (1990) 1 AC 109 : (1988) 3 WLR 776 : (1988) 3 All ER 545 (11L), cited

Not only are the expressions used in Section 66-A of the IT Act, 2000 expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of the Supreme Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. In point of fact, judgments of Constitution Benches of the Supreme Court have struck down sections which are similar in nature.

(Para 90)

*Supt., Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002; *Kameshwar Prasad v. State of Bihar*, 1962 Supp (3) SCR 369 : AIR 1962 SC 1166, applied

*Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103, relied on

Section 66-A of the IT Act, 2000 is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down as unconstitutional on the ground of overbreadth.

(Para 94)

(6) Possibility of an act being abused by authorities

Z. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 66-A — Provision must be judged on its own merits and so judged, it is unconstitutional — Proposition that mere possibility of provision capable of being abused by authorities administering it cannot be test of determining its validity — Held, cannot hold good when provision is otherwise found to be wholly unconstitutional — Provision cannot also be saved on basis of assurance on behalf of Government that it would be administered in a reasonable manner — Constitution of India — Arts. 13 and 19(1)(a) and 19(2) — Statute Law — Validity/Judicial review — A provision must be judged on its own merits without reference to how well it may be administered or any assurance in that regard from the Government of the day

Held :

It is true that the fact that Section 66-A of the IT Act, 2000 is capable of being abused by the persons who administer it is not a ground to test its validity if it is otherwise valid. But it is the converse proposition i.e. a statute which is



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otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner, which would apply here. If Section 66-A of the IT Act, 2000 is otherwise invalid, it cannot be saved by an assurance from the present Government that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66-A of the IT Act, 2000 will go on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66-A of the IT Act, 2000 must be judged on its own merits without any reference to how well it may be administered. (Para 95)

- b *Collector of Customs v. Nathella Sampathu Chetty*, (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cri LJ 364, *relied on*  
*Belfast Corpn. v. O.D. Cars Ltd.*, 1960 AC 490 : (1960) 2 WLR 148 : (1960) 1 All ER 65 (HL), *cited*

(7) Severability

- c ZA. Information Technology, Internet, Computer and Cyber Laws  
— Information Technology Act, 2000 — S. 66-A — Found unconstitutional  
— Whether constitutionally valid portion severable — Doctrine of severability, held, not applicable, as S. 66-A purports to authorise imposition of restrictions on freedom of speech and expression in a language wide enough to cover restrictions both within and without the limits of constitutionally permissible action affecting such right — Possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out as it does not fall within any of the subject-matters contained in Art. 19(2) of the Constitution — As it cannot be split up into what is within and what is without the protection of Art. 19(2), provision as a whole must be declared as unconstitutional — Constitution of India — Arts. 13 and 19(1)(a) & 19(2) — Doctrine of severability — Applicability (Paras 97 to 100)

- e *Romesh Thappar v. State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514, *applied*  
*K.A. Abbas v. Union of India*, (1970) 2 SCC 780, *followed*  
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f (8) Procedural unreasonableness

- ZB. Information Technology, Internet, Computer and Cyber Laws  
— Information Technology Act, 2000 — S. 66-A — Procedural safeguards provided under Ss. 95, 96, 196 and 199 CrPC not available when any person is booked under S. 66-A for commission of similar offences over the internet  
— Contention regarding such procedural unreasonableness need not be considered once S. 66-A is struck down on substantive grounds — Criminal Procedure Code, 1973, Ss. 95, 96, 196 and 199 (Paras 105 and 106)

III. INFORMATION TECHNOLOGY ACT, 2000 — S. 69-A AND RULES — CONSTITUTIONALITY

- h ZC. Information Technology, Internet, Computer and Cyber Laws  
— Information Technology Act, 2000 — S. 69-A — Rules framed under subsection (2) — S. 69-A and Rules providing sufficient safeguards, held, not unconstitutional — Constitution of India — Arts. 19(1)(a) and 19(2) —

**Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 — Rr. 3 to 10, 14 and 16 — Valid**

The constitutional validity of Section 69-A of the Act and the Rules has been assailed on the grounds that there is no pre-decisional hearing afforded by the Rules particularly to the "originator" of information, which is defined under Section 2(za) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided under Sections 95 and 96 CrPC are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the petitioners. a  
b

Rejecting the contention, the Supreme Court

*Held :*

Section 69-A, unlike Section 66-A of the IT Act, 2000, is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary to do so. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2) of the Constitution. Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution. c

The Rules further provide for a hearing before the Committee set up—which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under Section 69-A(3). d  
e

(Para 114)

Merely because certain additional safeguards such as those found in Sections 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. The Rules are not constitutionally infirm in any manner. f

(Para 116)

**IV. INFORMATION TECHNOLOGY ACT, 2000 — S. 79 AND INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES) RULES, 2011**

**2D. Information Technology, Internet, Computer and Cyber Laws — Information Technology Act, 2000 — S. 79(3)(b) — Held, valid subject to being read down — S. 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that: (1) a court order has been passed asking it to expeditiously remove or disable access to certain material, or (2) on being notified by the appropriate Government or its agency that unlawful acts relatable to Art. 19(2) of the Constitution are going to be committed, then fails to expeditiously remove or disable access to such material — The court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Art. 19(2) of the Constitution — Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, Rr. 3 to 10, 14 and 16** g  
h

**ZE. Information Technology, Internet, Computer and Cyber Laws — Information Technology (Intermediary Guidelines) Rules, 2011 — R. 3(4) —**

- a** Held, valid subject to being read down — Held, the knowledge spoken of in the said sub-rule must only be through the medium of a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Art. 19(2) of the Constitution are going to be committed and the intermediary then fails to expeditiously remove or disable access to such material — The court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Art. 19(2) of the Constitution

**Held :**

Section 79 being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. Under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. There are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

(Para 121)

- d** However, Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material or on being notified by the appropriate Government or its agency that unlawful acts relatable to Article 19(2) of the Constitution are going to be committed then, fails to expeditiously remove or disable access to such material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. In other countries worldwide this view has gained acceptance, Argentina being in the forefront. Furthermore, the court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2) of the Constitution. Unlawful acts beyond what is laid down in Article 19(2) of the Constitution obviously cannot form any part of Section 79. With these two caveats, it is not necessary to strike down Section 79(3)(b). (Paras 122 and 124.3)

The Additional Solicitor General informed that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.

(Para 123)

- g** **V. KERALA POLICE ACT, 1960, S. 118**

**ZF. Police — Kerala Police Act, 1960 (5 of 1961) — S. 118 —** In pith and substance S. 118 falls under Sch. VII List II Entry 2 and additionally under Sch. VII List II Entry 1 of the Constitution, hence valid — Constitution of India — Art. 246 — Legislative competence — Pith and substance rule

- h** **ZG. Police — Kerala Police Act, 1960 (5 of 1961) — S. 118(d) —** Held, vague and violative of Art. 19(1)(a), being not saved by Art. 19(2) of the Constitution — Constitution of India, Arts. 19(1)(a) and 19(2)

*Held :*

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II of Schedule VII to the Constitution. In addition, Section 118 would also fall within Entry 1 of List II of Schedule VII to the Constitution in that as its marginal note tells it deals with penalties for causing grave violation of public order or danger. (Para 108)

If on examination of the enactment as a whole, it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. A statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. (Para 109)

*A.S. Krishna v. State of Madras*, 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409, followed

However, what has been said about Section 66-A of the IT Act, 2000 of the Information Technology Act would apply directly to Section 118(d) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and overbreadth, that led to the invalidity of Section 66-A of the IT Act, 2000, and for the reasons given for striking down Section 66-A of the IT Act, 2000, Section 118(d) also violates Article 19(1)(a) of the Constitution and not being a reasonable restriction on the said right and not being saved under any of the subject-matters contained in Article 19(2) of the Constitution is hereby declared to be unconstitutional. (Paras 111 and 124.4)

Writ petitions disposed of

R-D/54597/CR

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71.	255 US 81 : 41 S Ct 298 : 65 L. Ed 516 : 14 ALR 1045 (1921), <i>United States v. L. Cohen Grocery Co.</i>	152e
72.	250 US 616 : 63 L. Ed 1173 (1919), <i>Abrams v. United States</i>	129b-c, 141f-g
73.	63 L. Ed 470 : 249 US 47 (1919), <i>Schenck v. United States</i>	141e
74.	221 US 418 : 31 S Ct 492 : 55 L. Ed 797 : 34 LRA (NS) 874 (1911), <i>Gompers v. Buck's Stove &amp; Range Co.</i>	144e-f
75.	92 US 214 : 23 L. Ed 563 (1876), <i>United States v. Reese</i>	153a-b h
76.	(1868) LR 3 QB 360, <i>R. v. Hicklin</i>	147e, 147g-h

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SUMMARY OF ARGUMENTS

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d *I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner, Shreya Singhal in WP (Crl.) No. 167/2012*

1. Section 66-A of the Information Technology Act, 2000 (the said Act) is unconstitutional because it violates the fundamental rights of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution.

e 2. (a) "Freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and governments and must be preserved." [See *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 at 866.]

f (b) "Freedom of the press is the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions. Never has criticism been more necessary than today, when the weapons of propaganda are so strong and so subtle. But, like other liberties, this also must be limited." [See *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 : (1973) 2 SCR 757 at 829.]

g (c) "Very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression, and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations...." [See *Romesh Thappar v. State of Madras*, 1950 SCR 594 at 602.]

h (d) "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the

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Summary of Arguments (contd.)

I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner (contd.)

possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. ... an enactment, which is capable of being applied to cases where no such danger would arise, cannot be held to be constitutional and valid to any extent." [see *Romesh Thappar v. State of Madras*, 1950 SCR 594 at 603.] a

(e) "It is indisputable that by freedom of the press is meant the right of all citizens to speak, publish and express their views. The freedom of the press embodies the right of the people to read. The freedom of the press is not antithetical to the right of the people to speak and express." [See *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 : (1973) 2 SCR 757 at 829.] b

3. "There is nothing in clause (2) of Article 19 which permits the State, to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under a law competent under clause (2) of Article 19." [See *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 at 862.] c d

4. Restrictions which can be imposed on freedom of expression can be only on the heads specified in Article 19(2) and none other. Restrictions cannot be imposed on the ground of "interest of general public" contemplated by Article 19(6). [See *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 at 868.]

5. Section 66-A penalises speech and expression on the ground that it causes annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will. These grounds are outside the purview of Article 19(2). Hence the said section is unconstitutional. [See *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 226-27.] e

6. Section 66-A also suffers from the vice of vagueness because expressions mentioned therein convey different meanings to different persons and depend on the subjective opinion of the complainant and the statutory authority without any objective standard or norm. [See *State of M.P. v. Baldeo Prasad*, (1961) 1 SCR 970 at 979; *Harakchand Ratanchand Banthia v. Union of India*, (1969) 2 SCC 166 at 183, para 21; *K.A. Abbas v. Union of India*, (1970) 2 SCC 780 at 799, paras 45-46; *Burstyn v. Wilson*, 96 L Ed 1098 at 1120-22; *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 199-200.] f g

7. In that context enforcement of the said section is an insidious form of censorship which is not authorised by the Constitution. [See *Hector v. Attorney General of Antigua & Barbuda*, (1990) 2 All ER 103.]

8. There are numerous instances about the arbitrary and frequent invocation of the said section which highlight the legal infirmity arising from h



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Summary of Arguments (*contd.*)

1. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner (*contd.*)

a uncertainty and vagueness which is inherent in the said section.

(emphasis added)

9. The said section has a chilling effect on freedom of speech and expression and is thus violative of Article 19(1)(a). [See *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632 at 647; *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600 at 620.]

b 10. Freedom of speech has to be viewed also as a right of the viewers which has paramount importance, and the said view has significance in a country like ours. [See *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 229.]

c 11. It is not correct to suggest that Section 66-A was necessitated to deal with the medium of the internet. Offences under the Penal Code (IPC) would be attracted even for actions over the internet. In particular, Sections 124-A, 153-A, 153-B, 292, 293, 295-A, 505, 505(2) IPC, it is submitted, suffice to cover the situations which are being used by the Union of India as illustrations to justify the existence of Section 66-A on the statute. The aforesaid IPC offences take into consideration any or every medium of expression. As long as written words are within its ambit, merely because  
d they are written on a public medium on the internet would not take such actions beyond their purview, especially in view of Section 65-B of the Evidence Act, 1872.

e 12. Furthermore, assuming without admitting that Section 66-A was necessitated to deal with the medium of the internet, the standards for restricting the same would still have to conform to Article 19(2). The standards for every medium cannot be drastically different as that would be violative of Article 14. There is no intelligible differentia between an expression on the internet and that on a newspaper or a magazine, for the purposes of Article 19(1)(a) read with Article 19(2).

f 13. English cases cited by the respondents are based on Articles 10(1) and 10(2) of the European Convention on Human Rights 1950 (ECHR). The heads of restriction in Article 10(2) of ECHR are wider than those prescribed under Article 19(2) of our Constitution.

g 14. Furthermore, the question of reasonableness of the restrictions arises when restrictions imposed are on heads specified in Article 19(2). If restrictions imposed are outside the prescribed heads they are *per se* unconstitutional and alleged reasonableness of restrictions cannot cure the fundamental constitutional infirmity.

h 15. Constitutionality of a statute is to be adjudged on its terms and not by reference to the manner in which it is enforced. "The constitutional validity of a provision has to be determined on construing it reasonably. If it passes the test of reasonableness, the possibility of powers conferred being improperly used, is no ground for pronouncing it as invalid, and conversely if the same properly interpreted and tested in the light of the requirements set

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Summary of Arguments (contd.)

I. Mr Soli J. Sorabjee, Senior Advocate, for the petitioner (contd.)

out in Part III of the Constitution, does not pass the test, it cannot be pronounced valid merely because it is being administered in the manner which might not conflict with the constitutional requirements." [See *Kantilal Babulal & Bros. v. H.C. Patel*, (1968) 1 SCR 735 at 749; *Collector of Customs v. Nathella Sampathu Chetty*, AIR 1962 SC 316 at 331, 332.] "A bad law is not defensible on the ground that it will be judiciously administered." [See *Kneller Ltd. v. DPP*, (1972) 2 All ER 898 at 906(b).]

16. The crux of the matter is: can the exercise of the invaluable fundamental right of freedom of expression be subject to or be dependent upon the subjective satisfaction of a non-judicial authority and that too in respect of vague and varying notions about "grossly offensive", as "menacing character" and causes "annoyance", inconvenience, insult and injury.

17. The impugned heads of restrictions are inextricably linked with other provisions of the said section and are not severable. Hence, the entire Section 66-A is unconstitutional. [See *R.M.D. Chamarbaugwalla v. Union of India*, 1957 SCR 930 at 950-51.]

II. Mr Shyam Divan, Senior Advocate, Ms Mishi Choudhary, Mr Prasanth Sugathan, Mr Biju K. Nair, Ms Shagun Belwal, Mr Arjun J., Advocates for the petitioner, Mouthshut.com (India) Pvt. Ltd. in Writ Petition (C) No. 217 of 2013

#### A. Introduction

1. These written submissions filed on behalf of the writ petitioners are concise and pointed. Rather than setting out elaborate arguments, the petitioners have chosen to project the thrust of their case in this note to supplement the oral submissions at the Bar.

#### B. Relevant facts and relief

2. The first petitioner is a private limited company which operates Mouthshut.com, a social networking, user review website. The website provides a platform for consumers to express their opinion on goods and services, facilitating the flow of information and exchange of views with respect to products and services available in the marketplace. Since its founding in 2000, the popularity of this website has grown and an estimated 80 lakh users visit the website every month. Mouthshut.com is a pioneer in this field, predating other review websites and is the subject of academic studies that recognise the immense importance and value of the service it renders. Illustratively, (1) Philip Kotler, *Marketing Management* (2009), extract at Annexure 1; (2) Catcora, Philip et al, *International Marketing* (2008), extract at Annexure 2.

3. The second petitioner is an Indian citizen and a shareholder of the first petitioner. He is the founder of the first petitioner and its CEO. While at the time of the first petitioner's incorporation, its entire shareholding was held by the second petitioner, it is now held equally amongst the six brothers of the Farooqui family.

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Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

- a 4. The manner Mouthshut.com works is best understood with reference to the site's screenshots. Some of the essential features of this website are: (a) Any reader may visit the website and read its content; (b) To post a comment, the user is required to first register by providing an email address, user name and by creating a password. The user may also log in through Facebook or Google accounts (which have an established pre-registration protocol); (c) Businesses may respond to reviews and rebut claims and they have the option of paying a nominal fee to create an authorised account; (d) When problems are satisfactorily addressed on the Mouthshut.com platform, a "stamp" appears next to the grievance indicating resolution of the issue. Mouthshut.com does not provide any content of its own. It provides a platform that hosts content posted by users. Having regard to the nature of this website, users share their experiences with respect to goods and services in diverse categories such as appliances, automobiles, builders and developers, health and fitness industry, movies, music, restaurants, travel, etc.

- d 5. The petitioners constantly receive threatening calls from police officials across various States in India requiring the petitioners to block comments/content. The petitioners also regularly receive notices under Sections 91 and 160 of the Code of Criminal Procedure, 1973. This is apart from a flood of legal notices from private parties threatening the petitioners with defamation and civil suits instituted in different parts of the country. On several occasions, fabricated orders of courts have been served on the petitioners.

- e 6. The petitioners have thus far resisted the threats since taking down every negative comment in response to every complaint would erode the value and integrity of the website. Consumers visit the website before choosing a product or service because they expect to review genuine experiences of previous users, good or bad. Were the petitioners to yield to every complaint, Mouthshut.com would lose its utility and appeal.

- f 7. As an intermediary, the first petitioner enjoys immunity from liability in terms of Section 79 of the Information Technology Act, 2000 (the IT Act). The continuous barrage of threats and legal actions faced by the petitioners demonstrate that the intended "safe harbour" provided by the legislature simply does not work. The attenuation of Section 79 is due to the Information Technology (Intermediaries Guidelines) Rules, 2011 (the impugned Rules). The impugned Rules conflict with Section 79 and create an unworkable framework for intermediaries that desire to retain immunity.

- g 8. The petition challenges the IT (Intermediaries Guidelines) Rules, 2011 inasmuch as they are *ultra vires* the IT Act and Articles 14, 19(1)(a), 19(1)(g) and 21 of the Constitution of India.

C. Importance of intermediaries and necessity for immunity

- h 9. The expression "intermediary" is defined in Section 2(1)(w) of the IT Act. The relationship between users who access the internet, persons posting content on a website and intermediaries is illustrated in a diagram at p. 17 of

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Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

IA No. 4 of 2014. The first petitioner is an intermediary since it receives, stores and transmits electronic records on behalf of persons posting reviews and also because it is a web-hosting service provider. The distinction between hosting and posting, internet hosting service providers and web hosting service providers is drawn out at Annexure 3. a

10. Online intermediaries provide significant economic benefits and this is why across the world major economies provide a safe harbour regime to limit liability for online intermediaries when there is unlawful behaviour by intermediary users. Online intermediaries organise information by making it accessible and understandable to users. Intermediaries enhance economic activity, reduce costs and enable market entry for small and medium enterprises, thereby inducing competition, which eventually leads to lower consumer prices and more economic activity. The role of intermediaries and the economic benefits are explained at pp. 68-75 of IA No. 4 of 2014. b c

11. Online intermediaries do not have direct control of information that is exchanged on their platforms. Legal regimes across the world prescribe exemptions from liability for intermediaries and these safe harbour provisions are regarded as a necessary regulatory foundation for intermediaries to operate. d

12. In the wake of representations by the information technology industry following the arrest in 2004 of Avnish Bajaj, the CEO of Baazee.com, an auction portal, Parliament with effect from 27-10-2009 substituted Chapter XII of the IT Act comprising Section 79. This new safe harbour protection to intermediaries was introduced to protect intermediaries from burdensome liability that would crush innovation, throttle Indian competitiveness and prevent entrepreneurs from deploying new services that would encourage the growth and penetration of the internet in India. e

D. Important features of Section 79

13. Section 79 in Chapter XII of the IT Act comprises a self-contained regime with respect to intermediary liability.

14. The object of Section 79 is to exempt an intermediary from liability arising from "third-party information". An intermediary is exempt from all liability (civil and criminal) for any third-party information, data or communication link made available or hosted by him. The purpose of this wide exemption from liability is to protect intermediaries from harassment or liability arising merely out of their activities as an intermediary. f

15. The opening words of Section 79 are a widely worded non obstante clause which overrides "anything contained in any law for the time being in force". (Section 81 gives overriding effect to the Act in relation to inconsistent provisions contained in any other law.) The clear intent of Parliament is to insulate intermediaries as a class from civil as well as criminal liability. g

16. The exemption from liability granted by Section 79(1) is subject to the provisions of sub-sections (2) and (3) of Section 79. h

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Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

a 17. Section 79(2)(c) provides that in order to ensure exemption from liability under Section 79(1) the intermediary "*observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf*". The mandate of this provision empowers the Central Government to frame statutory guidelines for a specific objective, that is, to ensure observance by an intermediary of his duties under the IT Act. This is clearly brought out by the underlined expressions, particularly the words "*in this behalf*".

b 18. The duties of an intermediary under the IT Act include (i) the duty to preserve and retain information as set out in Section 67-C; (ii) the duty to extend all facilities and technical assistance with respect to interception or monitoring or decryption of any information as envisaged in Section 69; (iii) the duty to obey government directions to block public access to any information under Section 69-A; (iv) the duty to provide technical assistance and extend all facilities to a government agency to enable online access or to secure or provide online access to computer resources in terms of Section 69-B; (v) the duty to provide information to and obey directions from the Indian Computer Emergency Response Team under Section 70-B; (vi) the duty to not disclose personal information as envisaged under Section 72-A; and (vii) the duty to take down any information, data or communication link, etc. used to commit an unlawful act as envisaged under Section 79(3)(b).

c 19. Section 79(3)(b) envisages a "*takedown*" provision where, *inter alia*, the exemption from liability enjoyed by the intermediary under Section 79(1) is lost "*on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource, controlled by the intermediary is being used to commit the unlawful act*" and the intermediary fails to expeditiously remove or disable access.

E. The IT (Intermediaries Guidelines) Rules, 2011

f 20. Rule 3 of the impugned Rules enumerates various requirements that an intermediary must observe while discharging his duties. These requirements constitute due diligence and are summarised below:

(a) Rule 3(1) requires the intermediary to publish rules and regulations, adopt a privacy policy, provide a user agreement for access to the intermediary's computer resource.

g (b) Rule 3(2) requires that the rules and regulations, terms and conditions or user agreement inform the user not to host, display, upload, modify, publish, transmit, update or share "*information*" enumerated in sub-clauses (a)-(i) of Rule 3(2).

(c) Rule 3(3) proscribes the intermediary from knowingly hosting or publishing information or initiating transmission in respect of the information specified in sub-clauses (a)-(i) of Rule 3(2).

h (d) Rule 3(4) requires the intermediary to take down information within 36 hours of receiving a written intimation from an "affected

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

person" that such information contravenes sub-clauses (a)-(i) of Rule 3(2). a

(e) Rule 3(4) requires the intermediary to preserve such contravening information for 90 days for the purpose of investigation.

(f) Rule 3(5) requires the intermediary to inform its users that in the event of non-compliance with rules and regulations, user agreement or privacy policy, the intermediary would have a right to immediately terminate the access or usage rights of the users to the computer resource of the intermediary and remove non-compliant information. b

(g) Rule 3(6) requires the intermediary to strictly follow the provisions of the IT Act "or any other law for the time being in force".

(h) Rule 3(7) requires the intermediary to provide information or assistance to government agencies. c

(i) Rule 3(8) requires the intermediary to take all reasonable measures to secure its computer resource.

(j) Rule 3(9) requires the intermediary to report cyber security incidents and share information with the Indian Computer Emergency Response Team. d

(k) Rule 3(10) proscribes the intermediary from knowingly deploying or installing or modifying the technical configuration of a computer resource to circumvent any law;

(l) Rule 3(11) requires the intermediary to publish on its website the name of the Grievance Officer as well as contact details and mechanism to redress complaints within one month from the date of the receipt of the complaint. e

21. The petitioners' main problem is with Rule 3(4). Rule 3(4), *inter alia*, provides that upon receiving in writing or through email signed with electronic signature from any affected person, any information as mentioned in Rule 3(2), the intermediary shall act within 36 hours to disable such information that is in contravention of Rule 3(2). Further, the intermediary is required to "work with user or owner of such information" before disabling the information. f

*F. Why the impugned Rules are ultra vires*

22. The principal points which according to the petitioners render the impugned Rules *ultra vires* are set out in the section. However, before elaborating these points the petitioners seek to highlight their real grievance. g

23. As an intermediary, the first petitioner provides a platform and enables users to connect and exchange views through the platform. Mouthshut.com is not providing the content which is supplied by users. The first petitioner has a lean operation in terms of human resources and the website is programmed in a manner by which users can exchange views and business can respond to consumers with ease, without any specific human intervention on the part of the Mouthshut.com team. h

Summary of Arguments

H. Mr Shyam Divan, Senior Advocate, for the petitioner (contd.)

- a 24. Being an intermediary, the first petitioner is anxious to retain the exemption from liability conferred under Section 79(1) of the IT Act. The petitioners cannot afford to be dragged across the country in response to summons, court cases, etc. that relate to content uploaded by third parties. The petitioners have no objection to taking down the material in response to orders passed by a duly authorised government agency or a court. Indeed, the petitioners submit that on a correct interpretation of the relevant provisions, the IT Act envisages full protection and immunity to intermediaries provided that the intermediary extends cooperation to government agencies and facilitates implementation of duly authorised orders.
- b 25. The problem is that the impugned Rules, specifically Rule 3(4), require the intermediary to (i) respond to any "affected person" making a written complaint; (ii) contact and work with the user or owner of the information who has posted the information on the first petitioner's website; (iii) make a determination or judgment as to whether the information complained about contravenes Rule 3(2); and (iv) take down such information. At a practical level, the first petitioner is compelled to set up an adjudicatory machinery or in default take down each and every piece of information complained about. While taking down information within 36
- c hours is the surest manner of retaining immunity, this would completely compromise the value of the website since users expect genuine product and service reviews, both positive and negative. The petitioners have no difficulty in complying with "takedown" orders passed by a court or government agency, but to cast the burden of adjudicating complaints on the intermediary as part of its duty to retain exemption from liability under Section 79(1) is
- d onerous and unreasonable.
- e 26. Adjudicating on whether or not there is contravention of a particular provision of law, is the quintessential sovereign function to be discharged by the State or its organs. This function cannot be delegated to private parties such as intermediaries. Rule 3(4) of the impugned Rules, by requiring the intermediary to assume the role of a Judge, in place of some State agency,
- f amounts to a wrongful abdication of a fundamental State duty.
27. The petitioners submit that the impugned Rules are *ultra vires* the IT Act as well as the Constitution of India for the following reasons which are set out in point form:
- g (a) The power of the Central Government to frame statutory guidelines with respect to intermediaries is circumscribed by the limits contained in Section 79(2)(c). The purpose of the guidelines is to ensure that an intermediary observes due diligence while discharging his duties under the IT Act. This is evident from the expression "*in this behalf*". The statutory duties of an intermediary are set out in Sections 67-C, 69, 69-A, 69-B, 70-B, 72-A and 79(3)(b). The "due diligence" guidelines in Rule 3(2) have nothing to do with observance of the statutory duties
- h under the abovementioned sections. Rule 3(2) travels beyond the narrow limit defined with respect to guidelines under Section 79(2)(c).

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

(b) Section 79(3)(b) contemplates a situation where an intermediary *a*  
"on being notified" by the appropriate Government or its agency must  
"take down" the offending material. Rule 3(4) directly conflicts with the  
scheme in the section because (i) it requires the intermediary to respond  
to any "affected person", not just the appropriate government or its  
agency; (ii) it requires the intermediary to work with the user or owner of  
such information; (iii) it requires the intermediary to adjudicate or *b*  
determine whether there is contravention of Rule 3(2). None of these  
roles and requirements is envisaged in Section 79 and, indeed, the Rules  
directly conflict with the parent statute in this regard.

(c) The purpose of the non obstante clause in Section 79 is clearly to  
give overriding effect and grant exemption from liability to  
intermediaries. Rule 3(6) of the impugned Rules by requiring the *c*  
intermediary to "strictly follow the provisions ... or any other laws for the  
time being in force" brings about a direct conflict with the non obstante  
clause. Requiring compliance with all other laws in force as a condition  
of "due diligence", reintroduces by a back door the very laws that the  
legislature deemed appropriate to override in the context of intermediary  
liability.

(d) The impugned Rules introduce a censorship regime. The object of *d*  
Section 79 is to confer immunity on intermediaries, not to introduce  
censorship by private edict. At a practical level, an intermediary, in its  
anxiety to retain immunity, will almost always take down material the  
moment it receives a written intimation from any affected person. This is  
quite apart from taking down material in response to directions from  
police departments. The guidelines under the impugned Rules leave an *e*  
intermediary with a Hobson's choice where it wants to retain protection  
under the safe harbour provision.

(e) The statutory machinery for disabling access to content on a  
website is through two possible channels, apart from a court order. The  
statutory channels are under Section 79(3)(b) and Section 69-A. The  
takedown regime triggered by any unspecified private individual *f*  
(affected person) is beyond the statute and amounts to creating a third  
mechanism which is not envisaged by the Act.

(f) The power of government to impose reasonable restrictions with  
respect to speech is circumscribed by Article 19(2) of the Constitution of  
India. By seeking to control speech and expression that is "grossly  
harmful", "harassing", "blasphemous", "invasive of another's privacy", *g*  
"hateful", "racially, ethnically objectionable", "disparaging", "otherwise  
unlawful in any manner whatsoever", "harm minor in any way", "violates  
any law for the time being in force", etc. the impugned Rules travel  
beyond Article 19(2) with respect to the aforesaid undefined expressions.

(g) The expressions in the previous sub-paragraph are vague. When *h*  
this vagueness is coupled with a requirement on the part of an  
intermediary to ensure non-contravention in terms of Rule 3(4), or else



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Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

- a lose exemption from liability, the statutory scheme is liable to be struck down as unconstitutional under Article 14 on the grounds of vagueness and arbitrariness.
- (h) The impugned Rules do not make any provision for restoring content that has been taken down. The intermediary, in order to retain immunity, is not only required to take down material within 36 hours, but is also prevented from putting back information. This is because unlike Sections 52(1)(b) and (c) of the Copyright Act, 1957 which permits restoration of access to the material complained about, there is no corresponding provision in the impugned Rules. The impugned Rules are unconstitutionally over broad because they compel permanent removal of material without determination by a government agency or court.
- b
- (i) The second petitioner is a citizen of India and is entitled to invoke Article 19(1)(a). Article 19(1)(a) embraces commercial speech (*Tata Press Ltd. v. MTNL*, (1995) 5 SCC 139, paras 24 and 25). The first petitioner's website encourages and enables the exchange of information with respect to a product or service and also enables the manufacturer or service provider to address consumer issues on the platform. This lifts the quality of goods and standard of services in society. The right to rebut or respond is protected under Article 19(1)(a) (*LIC v. Manubhai D. Shah*, (1992) 3 SCC 637, paras 8, 9 and 12). Moreover, where a person's business is intricately connected with speech as in the case of the importer of books, any illegal restriction not only impinges upon Article 19(1)(g) but also amounts to an infraction of Article 19(1)(a), (*Gajanan Visheshwar Birjur v. Union of India*, (1994) 5 SCC 550, paras 7-9). The impugned Rules, in their operation, through an over broad, "affected person" triggered takedown mechanism restrict commercial speech and are violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India.
- c
- (j) The first petitioner's servers are all located in India. Unless the intermediary safe harbour provision is meaningfully interpreted as suggested by the petitioners, it will compel an Indian enterprise to relocate geographically to a more intermediary friendly jurisdiction.
- d
- e
- f

G. Miscellaneous material

28. In the course of the oral arguments, the petitioners explained the nature of takedown provisions in other jurisdictions with reference to a report analysing the impugned Rules prepared by SFLC.in.

9 H. Reply to respondent's note on Section 79

29. In reply to Para 3, the subordinate legislation has to be within the contours permitted by the Constitution and cannot in any way be justified because the clauses are similar to the terms of service of private intermediaries. Terms of service of intermediaries are, at best, terms of a contractual relationship between a service provider and a user. Such terms cannot be equated to statutory rules notified by the Government. The tests for validity of a contract and a statute are different.
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Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

30. In reply to Para 8, the impugned Rules are unique to India and cannot be said to be similar to provisions followed all over the world. E.g. in USA, under Section 230 of the Communications Decency Act, 1996, no provider or user of interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider. This gives an intermediary complete immunity from liability arising out of user generated content. The safe harbour protection given to intermediaries in USA is provided in detail at *Annexure 4*. Other jurisdictions like Finland and Canada follow a takedown and put-back regime and notice-and-notice regime respectively, wherein the content creator is given an opportunity of being heard. Additional information about the practice in these jurisdictions is provided at *Annexure 5*.

31. Contrary to the respondent's account of legislative history (enumerated in Paras 10-40), the enactment of Section 230 was not the culmination of protracted legislative and judicial debates surrounding the imposition of strict liability on intermediaries with respect to copyright infringing content. In fact, Congress' intention behind enacting Section 230 was discussed extensively in a 4th Circuit Court of Appeals judgment in *Zeran v. AOL* [139 F 3d 327 (1997)], where the Court observed that the section had evidently been enacted to maintain the robust nature of internet communications and to keep Government interference in the medium to a minimum. A true copy of the judgment of the 4th Circuit Court of Appeals in *Zeran v. AOL*, [139 F 3d 327 (1997)] is provided at *Annexure 6*.

32. In reply to Para 46, the Special Rapporteur emphasises that censorship measures should never be delegated to private entities, and that intermediaries should not be held liable for refusing to take action that infringes individuals' human rights. Any requests submitted to intermediaries to prevent access to certain content, or to disclose private information for strictly limited purposes such as administration of criminal justice, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue is provided at *Annexure 7*.

33. In reply to Para 49, the judgment in *Delfi AS v. Estonia* (No. 64569/09) is under consideration at the Grand Chamber of European Court of Human Rights consequent to a referral made on 17-2-2014 and cannot be relied upon for the purpose of the present writ petition.

34. In the course of oral arguments the respondent clarified that the intermediary will have to acknowledge a complaint within 36 hours and will have to take action within 30 days as provided under Rule 3(11). However, the problem with the impugned Rules is that the intermediary still has to perform an adjudicatory role and if its decision is in variance with the Court's decision at a later stage, the intermediary could be made secondarily liable.

Summary of Arguments

II. Mr Shyam Divan, Senior Advocate, for the petitioner (*contd.*)

- a 35. The respondent's argument that Section 69-A has limited application and an individual user does not have a redressal mechanism under Section 69-A is not true. The Rules notified under Section 69-A list an elaborate procedure, including a form for filing a complaint, for a person to complain if he is aggrieved by any content. Objectionable content under Section 69-A falls within the ambit of Article 19(2), much unlike the vague expressions used under Rule 3(2) of the impugned Rules.

b

III. Mr Sajan Poovayya, Senior Advocate, for the petitioner, Rajeev Chandrasekhar in Writ Petition (Civil) No. 23 of 2013

- c 1. The instant writ petition is filed under Article 32 of the Constitution of India, in public interest, challenging the constitutionality of Section 66-A of the Information Technology Act, 2000 (the "IT Act"), as inserted by the Information Technology (Amendment) Act, 2008, and the Information Technology (Intermediaries Guidelines) Rules, 2011 (the Rules) for being arbitrary and vague; *ultra vires* the Constitution of India and the IT Act, respectively; for being violative of the fundamental rights of free speech and expression guaranteed by Article 19(1)(a) of the Constitution of India; and  
d for protection against arbitrary State action under Article 14.

A. Section 66-A of the IT Act and Article 14 of the Constitution

- e 2. Section 66-A is a penal provision which criminalises expression on grounds of being "grossly offensive" or for "causing annoyance, inconvenience, danger, obstruction, insult", etc. Section 66-A creates three sets of standalone offences under clauses (a), (b) and (c). Whilst the requirement of *mens rea* is contained in Section 66-A (b), Sections 66-A(a) and (c), proceeds to criminalise a wide range of activities, independent of the mental state of the person sending the message. A juxtaposition of Section 66-A with the other penal sections of the Act i.e. Sections 66-B, 66-C, 66-D, 66-E, 66-F, all of which require intent i.e. *mens rea*, clearly demonstrates its overreaching import. The usage of vague terminology in Section 66-A, such as "causing inconvenience", "causing annoyance", etc.; further compounds the problem. It admits of no certain construction and persons applying the section would be in a boundless sea of uncertainty. The absence of requirement of *mens rea* in Sections 66-A(a) and (c), would lead to criminalising the action of a citizen on an electronic platform, which are otherwise completely legitimate.

- g 3. Section 66-A suffers from the vice of vagueness because the expressions mentioned therein convey different meanings to different persons and depend on the subjective opinion of the complainant and the statutory authority without any objective standard or norm. In the context of the internet, the enforcement of Section 66-A, is an insidious form of censorship which is not authorised by the Constitution and therefore Section 66-A must  
h be struck down by this Hon'ble Court as unconstitutional.

Summary of Arguments

III. Mr Sujan Poovayya, Senior Advocate, for the petitioner (*contd.*)

4. Section 66-A is so wide in its import that even private communications through cellular telephony are covered. Defining the offence with reference to the medium employed for communication leads to arbitrariness. For example, an identical communication in a physical form would not be subjected to penal action. However, the same communication over an electronic platform exposes the person to criminal liability. That such speech is actionable is apparent from the text of Section 66-A. Moreover, it has been interpreted in the manner demonstrated above, with arrests having been made for forwarding of emails supposedly containing offensive content to a closed group, as well as, remarks on a social network that could be viewed only by a group of selected recipients. a

5. The terms deployed in Section 66-A are undefined and no standards or principles have been laid down by the statute to guide and control the exercise of such power, either in terms of law enforcement or in terms of justiciability. Therefore, inasmuch as Section 66-A lays down no guidelines for exercise of power under that provision, it is violative of Article 14 of the Constitution because it would permit arbitrary and capricious exercise of such power which is the very antithesis of equality before law. [Ref.: *Naraindas Indurkha v. State of M.P.*, (1974) 4 SCC 788, at Para 21] b

6. Due to the vague, undefined terms/phrases employed in Section 66-A, it remains uncertain as to what act is criminalised under the provision. Criminal law should with certainty indicate the acts that are permissible to a citizen. When such vague terms are used which permit arbitrary exercise of power, and further, when such uncanalised power is vested in an authority, the law would suffer from the vice of discrimination, since it would leave it open to an authority to discriminate between persons and things similarly situated. [Ref.: *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, at Para 16] c

7. The unconstitutionality in Section 66-A arises not because there is a mere possibility of abuse of the provision. The uncontrolled or unguided power which is vested in the administrative agencies without any reasonable and proper standards being laid down in the enactment, makes the discrimination evident. This factum is further buttressed by the multiple arrests made under the provision for political discussion, dissent and criticism of administration. In such circumstances, not merely the administrative act but Section 66-A itself is liable to be struck down as unconstitutional. [Ref.: *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCR 284, at Para 75(a) and 75(c)] d

8. The expressions used in Section 66-A, such as, "grossly offensive", "menacing character", "annoyance", "inconvenience", "danger", "obstruction", etc., does not admit of any precise definition and no guidance is provided for interpreting these terms; this renders Section 66-A unconstitutional for vagueness. The Union has, by its actions, admitted that Section 66-A is vague. This is demonstrated by the issuance of the advisory e

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Summary of Arguments

III. Mr Sajjan Poovayya, Senior Advocate, for the petitioner (*contd.*)

- a dated 9-1-2013 by the Union of India laying down certain guidelines for arresting individuals for offences committed under Section 66-A. It is trite that if a law does not pass the test of Part III of the Constitution, it is termed invalid. The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow, that a statute which is otherwise invalid as being unreasonable cannot be saved by it being administered in a reasonable manner. Therefore, if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test, it cannot be pronounced valid, merely because it is administered in a manner which might not conflict with the constitutional requirements. The provision which cannot independently pass the test of Part III of the Constitution, cannot be saved by such a device attempting to administer Section 66-A in a manner not to conflict with the constitutional mandates, does not save the unconstitutionality of the law. [Ref.: *Collector of Customs v. Nathella Sampathu Chetty*, (1961) 3 SCR 786]
- b 9. A law can be considered bad and unconstitutional for sheer vagueness. [Ref.: *K.A. Abbas v. Union of India*, (1970) 2 SCC 780]. For example, when the definition of "goonda" in the Central Provinces and Berar Goondas Act, 1946 indicated no tests for deciding which person fell within the definition, the entire statute was struck down as unconstitutional. [Ref.: *State of M.P. v. Baldeo Prasad*, (1961) 1 SCR 970.] The expressions used in Section 66-A are not supplied with any definition. There are no thresholds indicated as to whether the terms that have been employed in the provision are to be interpreted based on community standards or individual sensitivities.
- c Therefore, Section 66-A is liable to be declared unconstitutional by this Hon'ble Court.
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B. Section 66-A of the IT Act and Article 19(1)(a) of the Constitution

10. Any restriction on free speech and expression, as guaranteed under Article 19(1)(a) of the Constitution, can be imposed only under the specified buckets enumerated in Article 19(2) of the Constitution viz. (i) sovereignty and integrity of India, (ii) security of the State, (iii) friendly relations with foreign States, (iv) public order, (v) decency or morality, (vi) contempt of Court, (vii) defamation, and (viii) incitement to an offence. In addition to falling within the buckets, such restrictions must also satisfy the test of reasonableness. Any such restriction must be reasonable and the least intrusive or restrictive upon a citizen's rights. [Ref.: *Her Majesty the Queen in Right of the Province of Alberta v. Hutterian Brethren of Wilson Colony*, (2009) 2 SCR 567, Supreme Court of Canada; *Ramlila Maidan Incident, In re.*, (2012) 5 SCC 1, at Para 44] Therefore, for a restriction to pass the constitutional muster of Article 19(2), it should satisfy a dual test: (i) it must qualify under one of the enumerated buckets under Article 19(2); and (ii) it must be least intrusive and most reasonable to achieve the purpose. [Ref.: *Supt. Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 at Para 13.]
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Summary of Arguments

III. Mr Sajjan Poovayya, Senior Advocate, for the petitioner (*contd.*)

However, the restrictions imposed by Section 66-A travel far beyond these permissible limits. Therefore, Section 66-A is liable to be struck down. a

11. Section 66-A has a chilling effect on free speech. The terms used in the section, for example, "grossly offensive", "menacing character", "annoyance", "inconvenience", "danger", "obstruction", etc., are vague and fail to provide any reasonable standard of application or adjudication. Additionally, these undefined expressions, do not comport to any of the permissible grounds mentioned in Article 19(2), under which the freedom of speech and expression may be legitimately restricted by the State. b

12. The provision effectively adds a new offence to the penal law of India i.e. criminalising speech by reason of subjective annoyance or inconvenience it causes to intended or unintended recipients. It creates a new offence simply on the basis of medium adopted for communication. An identical communication in a physical form continues to not be an offence, even if it causes "annoyance" or "inconvenience". Such a provision lends itself to abuse by authorities to control certain content or censor certain views. On its plain language, as well as in its operation till date, the provision criminalises speech that cannot be regarded as actionable under any existing penal provision, including Section 499 of the Penal Code, 1860, which defines defamation. c  
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13. While administrative guidelines such as requiring the approval of a senior police official prior to registering complaints under Section 66-A may be issued, the same does not cure the facial unconstitutionality of Section 66-A, on its very language. Firstly, such directives are of uncertain legal provenance and require to be harmonised with Sections 78 and 79 of the IT Act. Secondly, the threat of criminal prosecution, even if purportedly muted to a certain extent, nevertheless exists and will doubtless serve to "chill" speech on the internet, till such time as clarity is obtained with regard to the contours of actionable speech. Determination of the validity of all restrictions on the exercise of free speech should be made on a case-by-case basis. Any provision of law that fails to satisfy the exacting standard prescribed will be declared invalid. This protection should equally be accorded to free speech on the internet. [*Ref.: Ajay Goswami v. Union of India*, (2007) 1 SCC 143] e  
f

14. A provision of law that forces people to self-censor their views for fear of criminal sanction violates the constitutional guarantee of free speech and as such it is unconstitutional. That such censorship may also take place at the level of the intermediary, who provides the user the means to connect to the internet and communicate on an electronic platform, is also a very real prospect with Section 79 of the Act laying down an uncertain exemption from liability for such entities. That either a user or an intermediary would err in favour of suppressing content for fear of criminal sanction is incompatible with the values of a constitutional democracy. The overhanging threat of criminal prosecution merely for the exercise of civil liberties, guaranteed by the Constitution, by virtue of a vague and widely worded law g  
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Summary of Arguments

III. Mr Sajjan Poovayyan, Senior Advocate, for the petitioner (contd.)

- a is in violation of Article 21 of the Constitution of India. Therefore, Section 66-A has a chilling effect on freedom of speech and expression and is thus violative of Article 19(1)(a). [Ref.: *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632 at p. 647; *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600 at p. 620]
- b 15. Article 19(1)(a) protects not only the right of primary expression but also freedom of secondary propagation of ideas and the freedom of circulation. The freedom of speech and expression includes the right to acquire information and to disseminate it. It is submitted that freedom of speech and expression is necessary for self-expression, which is an important means of attaining free conscience and self-fulfilment. [Ref.: *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161; See also *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 at para 4]
- c 16. Freedom of speech and expression of opinion are of paramount importance to a democracy. There is nothing in Article 19(2) which permits the State to abridge this right on the ground of conferring benefits upon the public in general. It is also not open to the State to curtail or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people, unless such action could be justified under a law contemplated under one of the heads of Article 19(2). [Ref.: *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 at pp. 862, 866 and 868]
- d 17. Statutes that are vague and criminalise content transmission over the internet have been declared to be invalid as abrogating free speech. Section 66-A can be broadly compared to Section 501 (*indecent transmission*) and Section 502 (*patently offensive display*) of the US Communications Decency Act, 1996. The United States Supreme Court has struck down the two provisions of the US Communications Decency Act, 1996 by holding that they abridge the freedom of speech, protected by the First Amendment. Interpretation of law cannot be based on community standards. [Ref.: *Reno v. American Civil Liberties Union*, 521 US 844 (1997) at pp. 859, 862, 872, 874, 877 and 878]
- e 18. The Child Online Protection Act (COPA) was enacted by the United States Congress on 21-10-1998 in response to the decision of the Supreme Court of United States in 1997 in *Reno v. American Civil Liberties Union*, 521 US 844, in which the Court declared certain provisions of the Communications Decency Act, 1996 as unconstitutional, because it was not narrowly tailored to serve a compelling governmental interest, without impinging on the First and Fifth Amendments. However, the Congress' attempt to legislatively overrule the decision in *Reno* was thwarted by the judiciary at the stage of both preliminary injunction as well as upon trial. [Ref.: *Ashcroft v. American Civil Liberties Union*, 535 US 564 and *Ashcroft v. American Civil Liberties Union*, 542 US 656] COPA was struck down as unconstitutional for not being narrowly tailored to serve the compelling interest of the Congress and that it facially violates the First and Fifth
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**Summary of Arguments**

III. Mr Sujan Poovayya, Senior Advocate, for the petitioner (*contd.*)

Amendment, rights of the plaintiff. Subsequently, the Court of Appeal affirmed the District Court's order, holding that COPA does not withstand strict scrutiny, and pass the tests of vagueness or overbreadth analysis and thus is unconstitutional. [Ref.: *American Civil Liberties Union v. Michael B. Mukasey*, 534 F 3d 181] The United States Supreme Court refused to hear the appeal from the Court of Appeal's order.

**C. No compelling State interest in enacting Section 66-A**

19. The argument of the State that Section 66-A has been enacted to battle typical offences arising out of the use of the internet and by the use of computer resources (such as phishing attacks, viruses, data theft, etc.) is fallacious and deserves to be rejected. The existing provisions of the Penal Code and the other provisions of the IT Act i.e. Sections 67 and 66-B, 66-C, D, E and F, adequately cover various offences that may arise on the internet or on an electronic platform. A table demonstrating the various offences under the Information Technology Act and the Penal Code, is annexed hereto:

Nature of offence	Information Technology Act (as amended)	Indian Penal Code
Mobile phone lost/stolen		Section 379 — up to 3 years' imprisonment or fine or both
Receiving stolen computer/mobile phone /data (data or computer or mobile phone owned by you is found in the hands of someone else)	Section 66-B — up to 3 years' imprisonment or Rs 1 lakh fine or both	Section 411 — up to 3 years' imprisonment or fine or both
Data owned by you or your company in any form is stolen	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both	Section 379 — up to 3 years' imprisonment or fine or both
A password is stolen and used by someone else for fraudulent purpose	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 419 — up to 3 years' imprisonment or fine Section 420 — up to 7 years' imprisonment and fine
An email is read by someone else by fraudulently making use of password	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	
A biometric thumb impression is misused	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	



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Summary of Arguments

III. Mr. Sajjan Poovayya, Senior Advocate, for the petitioner (*contd.*)

a	An electronic signature or digital signature is misused	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	
	A phishing email is sent out in your name, asking for login credentials	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 419 — up to 3 years' imprisonment or fine or both
b	Capturing, publishing or transmitting the image of the private area without any person's consent or knowledge	Section 66-E — up to 3 years' imprisonment or fine not exceeding Rs 2 lakhs or both	Section 292 — up to 2 years' imprisonment and fine Rs 2000 and up to 5 years' imprisonment and fine Rs 5000 for second and subsequent conviction
c	Tampering with computer source documents	Section 65 — up to 3 years' imprisonment or fine up to Rs 2 lakhs or both Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both	
d	Data modification	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakh or both	
e	Sending offensive messages through communication service, etc.	Section 66-A — up to 3 years' imprisonment and fine	Section 500 — up to 2 years' imprisonment or fine or both Section 504 — up to 2 years' imprisonment or fine or both Section 506 — up to 2 years' imprisonment or fine or both if threat be to cause death or grievous hurt, etc. — up to 7 years' imprisonment or fine or both
f			
g			Section 507 — up to 2 years' imprisonment along with punishment under Section 506 Section 508 — up to 1 year's imprisonment or fine or both Section 509 — up to 1 year's imprisonment or fine or both of IPC as applicable
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Summary of Arguments

III. Mr Sajjan Poovayn, Senior Advocate, for the petitioner (*contd.*)

Publishing or transmitting obscene material in electronic form	Section 67 — first conviction up to 3 years' imprisonment and fine Rs 5 lakhs. Second or subsequent conviction — up to 5 years' imprisonment and fine up to Rs 10 lakhs	Section 292 — up to 2 years' imprisonment and fine Rs. 2000 and up to 5 years' imprisonment and Rs 5000 for second and subsequent conviction	a
Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form	Section 67-B — first conviction — up to 5 years' imprisonment and fine up to Rs 10 lakh. Second or subsequent conviction — up to 7 years' imprisonment and fine up to Rs 10 lakh	Section 292 — up to 2 years' imprisonment and fine Rs 2000 and up to 5 years' imprisonment and Rs 5000 for second and subsequent conviction	b
Misusing a wifi connection if done against the State	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment		c
Planting a computer virus if done against the State	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment		d
Conducting a denial of service attack against a government computer	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment		e
Stealing data from a government computer that has significance from national security perspective	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both Section 66-F — life imprisonment		f
Not allowing authorities to decrypt all communication that passes through computer or network	Section 69 — imprisonment up to 7 years and fine		g
Intermediaries not providing access to information stored on their computer to the relevant authorities	Section 69 — imprisonment up to 7 years and fine		h

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Summary of Arguments

III. Mr Sujan Poovayya, Senior Advocate, for the petitioner (contd.)

a	Failure to block websites, when ordered	Section 69-A — imprisonment up to 7 years and fine	
	Sending threatening messages by email	Section 66-A — up to 3 years imprisonment and fine	Section 504 — up to 2 years' imprisonment or fine or both
b	Word, gesture or act intended to insult the modesty of a woman		Section 509 — up to 1 year's imprisonment or fine or both — IPC as applicable
	Sending defamatory messages by email	Section 66-A — up to 3 years' imprisonment and fine	Section 500 — up to 2 years' imprisonment or fine or both
c	Bogus websites, cyber frauds	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 419 — up to 3 years' imprisonment or fine Section 420 — up to 7 years' imprisonment and fine
	Email spoofing	Section 66-C — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 465 — up to 2 years' imprisonment or fine or both Section 468 — up to 7 years' imprisonment and fine
d	Making a false document	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 465 — up to 2 years' or fine or both
	Forgery for purpose of cheating	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 468 — up to 7 years' imprisonment and fine
e	Forgery for purpose of harming reputation	Section 66-D — up to 3 years' imprisonment and fine up to Rs 1 lakh	Section 469 — up to 3 years' imprisonment and fine
	Email abuse	Section 66-A — up to 3 years' imprisonment and fine	Section 500 — up to 2 years' imprisonment or fine or both
f	Punishment for criminal intimidation	Section 66-A — up to 3 years' imprisonment and fine	Section 506 — up to 2 years' imprisonment or fine or both, if threat be to cause death or grievous hurt, etc. — up to 7 years' imprisonment or fine or both
	Criminal intimidation by an anonymous communication	Section 66-A — up to 3 years' imprisonment and fine	Section 507 — up to 2 years' imprisonment along with punishment under Section 506 IPC
g	Copyright infringement	Section 66 — up to 3 years' imprisonment or fine up to Rs 5 lakhs or both	Sections 63, 63-B of Copyright Act, 1957

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Summary of Arguments

III. Mr Sajjan Poovayya, Senior Advocate, for the petitioner (*contd.*)

20. A reading of Section 43 read with Section 66 of the IT Act contemplates all such circumstances/offences which the State purports to guard against by enacting Section 66-A i.e. destruction of information/data on a computer resource, virus contamination, disruption of computer network, data theft, etc., if done fraudulently, dishonestly, constitutes an offence, and makes it punishable with imprisonment up to three years or with fine which may extend to five lakh rupees or with both. Therefore, the enactment of a patently vague provision such as Section 66-A is wholly unjustified and the same deserves to be struck down by this Hon'ble Court as unconstitutional.

*D. The Information Technology (Intermediaries Guidelines) Rules, 2011 are ultra vires and unconstitutional*

21. Rules 3(2) read with 3(3), 3(4) and 3(7) of the Information Technology (Intermediaries Guidelines) Rules, 2011 also suffer from the vice of vagueness. Rule 3(2) employs undefined expressions such as "grossly harmful", "blasphemous", "ethnically objectionable", "grossly offensive", "menacing in nature", etc., which are subjective expressions and no guidance is provided for their interpretation, either in the Rules or in the IT Act. Rule 3(2) lists the various types of information that ought not to be carried on a computer system. Only clause (i) may be traced to Article 19(2) of the Constitution which contains the permissible grounds to restrict the exercise of free speech. Even clause (i) is a subordinate legislation and it does not qualify to be a law imposing restrictions pursuant to Article 19(2). Content that is "invasive of another's privacy", "ethnically objectionable", "disparaging", "harms minors in any way", are all considered objectionable and steps are required to be taken by the intermediary for their removal as soon as the intermediary is notified. This Rule violates Article 14 as it is arbitrary and overboard by granting the private intermediary the right to subjectively assess such content. It breaches Article 19(1)(a) in creating restrictions which are alien to the constitutional framework and is also beyond the scope of the Act which is restrictive in administering such regulation.

22. Rule 3(3) bars the intermediary from hosting any of the contents referred to in Rule 3(2). Section 79 makes it clear that the intermediary is free of liability if it does not actively participate in the transmission. As a result of the subordinate legislation, this protection is watered down to expose the intermediary to prosecution even if it merely "hosts" such content. Apart from being *ultra vires* the Act, Rule 3(3) provides for an objective test to assess the objectionable content under Rule 3(2) against which the subjective judgment of the intermediary will be tested. As a result, it is arbitrary and violates Article 14 of the Constitution.

23. Rule 3(4) provides for the intermediary to disable the information that is in contravention of Rule 3(2), either on its own or on the basis of

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Summary of Arguments

III. Mr Sujan Poovayya, Senior Advocate, for the petitioner (*contd.*)

- a information received within 36 hours. It is submitted that the turnaround period of thirty-six (36) hours for removal of content is completely impractical and infeasible for intermediaries to implement as they process enormous quanta of data, especially taking into account that an incredibly large number of takedown notices would be issued to large and popular intermediaries. A theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred is not workable and consequently is unconstitutional. [*Ref.: Religious Technology Service Centre v. Netcom*, 907 F Supp 1361]
- b

- c 24. Rule 3(4) permits an unguided application of mind by the intermediary as to whether Rule 3(2) has in fact been violated, and then leads to initiation of taking punitive action without even granting the alleged offender the right to be heard. This provision endows uncanalised power on the intermediary, and violates the user's valuable natural justice rights, and is therefore in breach of Article 14 of the Constitution.

- d 25. Rule 3(2) also creates discrimination between the internet and other media like television, newspapers and magazines. Parameters for being dubbed offensive content ought to be consistent across these various modes of disseminating information, but in laying down several additional factors, the internet as a medium is singled out for greater restraint. In being arbitrary, this is violative of Article 14 of the Constitution, in affecting internet entrepreneurs, it breaches Article 19(1)(g), and in depriving users of the right to share and access such otherwise unobjectionable content, it impacts Article 19(1)(a).
- e

- f 26. The Rules essentially endow the intermediary with the power of determining what information is objectionable, and then allowing it to both disable access to the information and terminate access of the user to the intermediary's computer system. This is a delegation of a State function to a private entity, which is impermissible and violative of constitutional norms, as it amounts to an abdication of an essential governmental function.

- g 27. The Rules create a legal and logical inconsistency, inasmuch as an intermediary which in any manner selects or modifies the information contained in a transmission is not entitled to the exemption granted by Section 79 of the IT Act; and by virtue of abdication of power to the intermediary by the State, the intermediary is forced under the Rules, to select and modify information by removing information objected to by "affected parties".

- h 28. For the reasons aforesaid, it is most respectfully prayed that Section 66-A of the IT Act and Rules 3(2), 3(3), 3(4) and 3(7) of the Information Technology (Intermediaries Guidelines) Rules, 2011 be declared as unconstitutional for being violative of Articles 14 and 19(1)(a) of the Constitution of India.

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Summary of Arguments (contd.)

**IV. Mr Prashant Bhushan and Mr Pranav Sachdeva,  
Advocates for the petitioner, Common Cause in  
Writ Petition (Civil) No. 21 of 2013**

1. These submissions are being filed limited on the issue of the constitutional validity of Section 66-A of the Information Technology Act, 2000. The petitioner seeks liberty to address the other issues raised in the writ petition separately. There is considerable evidence of the gross human rights violations in the form of arrests and threats under this section, as well as its chilling effect on free speech. Various petitioners have already placed a few such instances on record in the instant proceedings. These submissions, however, are limited to the issue of unconstitutionality of the section from a reading of its bare provisions.

*Restrictions under Section 66-A are vague, general and elastic*

2. The issue of vagueness rendering a statute unconstitutional was considered by this Hon'ble Court in *A.K. Roy v. Union of India*, (1982) 1 SCC 271 : AIR 1982 SC 710. While determining whether the expressions in the law were vague, general and elastic, this Hon'ble Court observed: "The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature... *The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution* since the decision in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 : (1978) 2 SCR 621. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity..."

3. In *State of M.P. v. Baldeo Prasad*, AIR 1961 SC 293, this Hon'ble Court has held that Sections 4 and 4-A of the Central Provinces and Berar Goondas Act suffer from infirmities as the definition of the word "goonda" affords no assistance in deciding which citizen can be put under that category, the result of such an infirmity is that the Act has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda, and in holding so has declared the Act to be unconstitutional due to the serious nature of the infirmities in the operative sections (i.e. Sections 4 and 4-A) of the Act. This Hon'ble Court in *K.A. Abbas v. Union of India*, (1970) 2 SCC 780 : AIR 1971 SC 481 has in passing observed that "*it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered.*"

4. In the United States any criminal statute which lacks clarity or is uncertain is held to be void on grounds of vagueness as it offends the Due Process Clause. "... vagueness may be from uncertainty in regard to persons

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Summary of Arguments (contd.)

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- a within the scope of the act ... or in regard to the applicable tests to ascertain guilt." [Musser v. Utah, 333 US 95, 97 (1948)]. A statute limiting the right to free speech and expression if found to be vague would be declared void. Winters v. New York, 333 US 507 (1948). "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." [Chicago v. Morales, 527 US 41 (1999)] "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abol[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked." [Grayned v. City of Rockford, 408 US 104 (1972).]
- e 5. In light of law laid down above it is submitted that the expressions used in Section 66-A — "grossly offensive", "menacing character", "annoyance", "inconvenience", "danger", "obstruction", "insult", "injury", "enmity", "hatred", or "ill will" — are vague, elastic and general. In the absence of any precise definition, limitation or clarification as to the extent and the scope of each of the expressions, it is impossible for a man of reasonable intelligence to precisely ascertain what conduct is prohibited under Section 66-A.
- g 6. The grievance herein is not uncertainty about the common meaning of these words but as to the clear determination of what conduct is covered under each of these expressions given the general nature of these expressions. It is the legislature's failure to distinguish between innocent conduct and conduct which is sought to be penalised under this clause that is sought to be remedied. The dictionary definition of each of the expressions gives them a far and wide reach which necessitates that the statute should limit their applicability by defining clear and precise standards of conduct. Given that the standard of certainty ought to be the highest in a criminal statute, Section 66-A should be declared void as it does not provide precise and clear definitions for each of the expressions.
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Summary of Arguments

IV. Mr Prashant Bhushan and Mr Pranav Suchdeva, Advocates for the petitioner (*contd.*)

7. Something that might be "grossly offensive" to one person need not be so to another person, similarly what might cause annoyance to one person need not affect another person in the same way. The conduct specified herein depends entirely on each complainant's sensitivity. This further buttresses the argument that the expressions used in the clause are vague and ambiguous. Further, the statute fails to specify on whose sensitivity the violation depends — whether the sensitivity of the Judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man. a  
b

8. It is true that most of these expressions have also been used in the Penal Code, however, it is submitted that the IPC unlike Section 66-A provides greater specificity to each of these expressions by limiting their scope by prescribing clear standards by which the prohibited conduct is to be determined. For e.g. Section 124-A which is the offence relating to sedition, it seeks to penalise any action that "attempts to bring into hatred or contempt or excites or attempts to excite disaffection", and it limits the scope of the said expressions such as "hatred" by placing an additional qualification that only when the same is directed "towards the Government established by law" that it is considered an offence. c

9. Section 153-A IPC deals with "promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony". For any act to be regarded as an offence under this section, the act must necessarily promote "feelings of enmity, hatred or ill will" and the additional qualification that limits the applicability of the section is that, the enmity, hatred or ill will should be between "different religious, racial, language or regional groups or castes or communities" and only on grounds of "of religion, race, place of birth, residence, language, caste or community". Lastly, Section 268 IPC which deals with nuisance, prescribes that a person is guilty of public nuisance if an act causes "annoyance to the public" only to the extent that it interferes with a person's right to enjoy his/her private property or any public right. It is submitted that in each of the above sections of IPC a concrete harm requirement is prescribed. Further the expressions such as "hatred", "enmity", "annoyance" are defined by who are the persons affected and reaction or sensibilities of the affected persons; it is submitted that this removes any kind of uncertainty or ambiguity. d  
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10. Section 66-A(a) is patently illegal on grounds of vagueness as no specific intent is prescribed, it simply seeks to penalise any information that is "grossly offensive" or has a "menacing character". The requirement of mens rea to do a prohibited act is necessary in all criminal statutes and the same is absent in clause (a) of Section 66-A. For e.g. under this sub-section a friend playing a prank simply in jest which as per the complainant's sensitivity qualifies to be "grossly offensive" might be penalised. It is submitted that right to offend is a basic part of free speech. A provision which states that there is a right to free speech provided a person does not g  
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Summary of Arguments (contd.)

IV. Mr Prashant Bhushan and Mr Pranav Sachdeva, Advocates for the petitioner (contd.)

- a cause any annoyance to any other person, makes the right to free speech absolutely meaningless.

*Restriction under Section 66-A falls outside the ambit of Article 19(2)*

- b 11. It is submitted that any restriction to freedom of speech and expressions is only valid if it meets the touchstone of Article 19(2). Article 19(2) lays down that the State can impose reasonable restrictions on the exercise of right provided under Article 19(1)(a) in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

- c 12. This Hon'ble Court in numerous judgments has held that when the Constitution provides for a distinct category of permissible restrictions, any law of the State which does not satisfy the requirements laid down in Article 19(2) is unconstitutional. In *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129 and *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 wherein the constitutional validity of Section 7(1)(c) of the East Punjab Public Safety Act, 1949 and Section 9(1-A) of the Madras Maintenance of Public Order Act, 1949 respectively were challenged. This Hon'ble Court in both the above cases has held that since both the sections impose wider restrictions than the restrictions authorised under Section 19(2) were held to be unconstitutional.

- e 13. Section 66-A is unconstitutional as the restraints placed on the freedom of speech and expression are far excessive than the restrictions under Article 19(2). Section 66-A seeks to punish anyone who by means of a computer resource or a communication device sends any information that is "grossly offensive" or has a "menacing character" or seeks to cause "annoyance or inconvenience" causing "danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will".

- f 14. It is submitted that terms such as "menacing character", causing "annoyance", "inconvenience", "obstruction" or "ill will" cannot be taken to mean as something which results in consequences counter to the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States; or that it affects public order, decency or morality; or is in relation to contempt of court, defamation or incitement to an offence. Casual conversation may be intended to "annoy" or cause "inconvenience"; this might be light-hearted banter or the earnest expression of personal opinion or emotion. But unless speech presents a clear and present danger of some serious substantive evil, it should not be forbidden nor penalised.

- g 15. Further, it is submitted that there is a difference between the restrictions enumerated in Section 66-A and that which is enumerated in Article 19(2). In serious or aggravated forms communication which is grossly offensive or causes danger, insult, injury, enmity or hatred might lead to consequences enumerated under Article 19(2). However, this Hon'ble Court

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in *Romesh Thappar v. State of Madras* (supra), wherein while dealing with the contention that the expression "public safety" in the impugned Act, which is a statute relating to law and order, means the security of the Province, and, therefore, "the security of the State" under Article 19(2) as it was prior to the Constitution (First Amendment) Act, 1951 has observed the following:

*"The Constitution thus requires a line to be drawn in the field of public order or tranquillity marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."*

Therefore, there being a significant difference in degree between the restriction enumerated under Section 66-A and Article 19(2), it cannot be said that the restrictions under Section 66-A can be construed to mean restrictions under Article 19(2).

16. There could be many instances where say, without breaching public order or defaming anyone, one may communicate with another with the possible intention of causing a slight annoyance or insulting them in order to emphasise an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. This section has the effect of making criminal a communication made by a consumer to the service provider or a manufacturer expressing his dissatisfaction with the product or the service; or a communication made by an irate citizen to a public official expressing his dissatisfaction over the current state of public affairs. Mere intolerance or animosity cannot be the basis for abridgment of the constitutional freedom under Article 19(1)(a).

17. Therefore, the petitioner respectfully submits that Section 66-A of the Information Technology Act, 2000 is unconstitutional.

*V. Mr Sanjay Parikh, Advocate, for the petitioner,  
PUCL in WP (Crl.) No. 199/2013*

1. The phrase "freedom of speech and expression" contained in Article 19(1)(a) has been given a very wide interpretation by this Hon'ble Court in several judgments. The freedom of speech and expression includes "freedom of propagation of ideas", "right to circulate one's ideas, opinion and views", "right of citizens to speak, publish and express their views as well as right of people to read" as well as the right to know about the affairs of the Government. Case law for the above proposition is given below:

(a) Vide *People's Union of Civil Liberties v. Union of India*, (2003) 4 SCC 399 in paras 16, 24-27, 38-45. In para 44 (p. 440) this Hon'ble Court has given a list of decisions in which the meaning to the phrase, "freedom of speech and expression", has been given.

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V. Mr Sanjay Parikh, Advocate, for the petitioner (contd.)

a 2. Freedom of speech can be restricted only in the interest of the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. [The only restriction which may be imposed on the rights of an individual under Article 19(1)(a) are those which clause (2) of Article 19 permits and no other.] Case law for the above proposition is given below:

b (a) Vide *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 at pp. 857, 862, 863 and 868

"At p. 863

c For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason, therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

"At p. 868

To repeat, the only restrictions which may be imposed on the rights of an individual under Article 19(1)(a) are those which clause (2) of Article 19 permits and no other"

e (b) *People's Union of Civil Liberties v. Union of India*, (2003) 4 SCC 399 at p. 438, para 39

"So legislative competence to interfere with a fundamental right guaranteed under Article 19(1)(a) is limited as provided under Article 19(2)."

f 3. To bring a challenge within the exceptions contained under Article 19(2) it must be established:

(a) Impugned legal provision must have proximate and reasonable nexus;

(b) The connection should be immediate, real and rational;

g (c) Impugned legal provision has to be clear, unambiguous and not vague;

(d) The expression contained in the impugned provision must itself constitute an offence.

Case law for the above proposition is given below:

h (a) Vide *Kameshwar Prasad v. State of Bihar*, 1962 Supp (3) SCR 369 at pp. 371, 373, 374, 378, 380 till 385. The question considered by this Hon'ble Court was whether Rule 4-A as far as it lays an embargo on

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any form of demonstration could be sustained as falling within the scope of Articles 19(2) and (3). Reliance was placed on the judgment in *Supt., Central Prison v. Ram Manohar Lohia*, [(1960) 2 SCR 821] and after acknowledging the connection has to be intimate, real and rational it was observed:

"At pp. 383-84

*The threat to public order should therefore arise from the nature of the demonstration prohibited. No doubt, if the rule were so framed as to single out those types of demonstration which were likely to lead to a disturbance of public tranquillity or which would fall under the other limiting criteria specified in Article 19(2) the validity of the rule could have been sustained. The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration—be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result."*

(b) Vide *Supt., Central Prison v. Ram Manohar Lohia*, [(1960) 2 SCR 821, at pp. 826, 827, 830, 832-36] Section 3 of the U.P. Special Powers Act, 1932 was under challenge in this case. After referring to the judgment of the Federal Court in *R. v. Vasudeva*, AIR 1950 FC 67, this Hon'ble Court observed that, "the decision in our view lays down the correct test. The limitation imposed in the interest of public order to be a reasonable restriction, is one which should have a proximate connection or nexus with public order. But not far-fetched, or hypothetical or problematic or too remote in the chain of its relation to public order." That is why it has been submitted that the phrase itself in an impugned provision should constitute the offence. For example, the expression, "annoyance", should result in the incitement of an offence or public disorder.

Finally while examining the impugned provision, this Hon'ble Court very clearly laid down the test to bring in an expression within Article 19(2). It stated:

"At pp. 836-37

*We shall now test the impugned section, having regard to the aforesaid principles. Have the acts prohibited under Section 3 any proximate connection with public safety or tranquillity? We have already analysed the provisions of Section 3 of the Act. In an attempt to indicate its wide sweep, we pointed out that any instigation by word or visible representation not to pay or defer payment of any exaction or even contractual dues to Government, authority or a landowner is made an offence. Even innocuous speeches are prohibited by threat of punishment. There is no proximate or even foreseeable connection between such instigation and the public order*

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V. Mr Sanjay Parikh, Advocate, for the petitioner (contd.)

- a sought to be protected under this section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order. We can only say that fundamental rights cannot be controlled on such hypothetical and imaginary considerations. It is said that in a democratic set-up there is no scope for agitational approach and that if a law is bad the only course is to get it modified by democratic process and that any instigation to break the law is in itself a disturbance of the public order. If this argument without obvious limitations be accepted, it would destroy the right to freedom of speech which is the very foundation of democratic way of life. Unless there is a proximate connection between the instigation and the public order, the restriction, in our view, is neither reasonable nor is it in the interest of public order. In this view, we must strike down Section 3 of the Act as infringing the fundamental right guaranteed under Article 19(1)(a) of the Constitution."

- d In support of the above finding, reliance was also placed on another Constitution Bench judgment, *Chintaman Rao v. State of M.P.*, (1950 SCR 759 at 756). In this case, this Hon'ble Court also held that the entire section being void as infringing Article 19(1)(a) of the Constitution must be struck down as the doctrine of severability is inapplicable—to enable the Court to affirm the validity of a part and reject the rest.

- e (c) Vide *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574 (at p. 586) (paras 21, 41, 45 and 53). In para 45 this Hon'ble Court observed that the anticipated danger should not be remote, conjectural or far-fetched and that it should have a proximate and direct nexus with the expression. Thereafter, it was observed that "in other words, the expression should be inseparably locked up with the action, contemplated like the equivalent of, 'spark in a powder keg'." In para 51 this Hon'ble Court emphasised that, "freedom of expression cannot be suppressed on account of threats of demonstration and violence and that is the obligatory duty of the State to protect the freedom of expression". While concluding, the Court further stated in para 53, content of Articles 19(1)(a) and 19(2), was summarised in para 53.

- g 4. Merely because the internet has a wider reach and speed in publishing information and also implication, the content of Article 19(1)(a) cannot be diluted. The restriction has to fulfil the parameters under Article 19(2). Case law for the above proposition is given below:

- h (a) Vide *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 at pp. 195, 208, 213, 226, 228. In this case, this Hon'ble Court was considering what telecasting means and what are its

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V. Mr Sanjay Pratik, Advocate, for the petitioner (contd.)

legal dimensions and consequences. After considering the judgments on Article 19, in para 37 the following question was posed: a

*"The next question which is required to be answered, is whether there is any distinction between the freedom of the print media, that of the electronic media such as radio and television and if so, whether it necessitates more restrictions on the latter media."*

There is a detailed discussion on Eric Brandt's book titled, *Broadcasting Law* as well as the judgment of the US Supreme Court in *Red Lion Broadcasting case*, 395 US 367. In para 43 the law on freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2) was summarised. It was also held that (vide para 45), burden is on the authority to justify the restriction. The question which was posed in para 37 was answered in para 78, where the Court stated that (at p. 227): b

*"But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures."* c d e f

5. By a general or vague provision the right of speech and expression cannot be curtailed. Section 66-A is general and vague, therefore, arbitrary and unreasonable, and violative of Articles 14 and 21 of the Constitution. The basic principle of legal jurisprudence is that a law is void for vagueness if its prohibitions are not clearly defined. Such laws result in unfairness and are attendant with dangers of arbitrary and discriminatory applications. Case law in support of the above proposition is given below: g

(a) Vide *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 at p. 644 (para 112) and p. 648 (para 130).

6. The intelligible differentia between the medium and of print/broadcast, real life speech and speech on the internet, is that speech on the internet h

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V. Mr Sunjay Parikh, Advocate, for the petitioner (contd.)

- a travels faster. There is however no rational nexus between creating new categories of criminal offences and any permissible aim sought to be achieved under Article 19(2). This is especially noticeable in the case of Section 66-A, rather than other offences such as cyber terrorism or hacking as covered under the Information Technology Act, 2000.

- b (a) *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 at 195.

- c 7. Section 66-A is also bad in law inasmuch as it mixes up minor and major offences and does not contain any differentiation between the penalties for them. It includes, "criminal intimidation" and, "annoyance" both as bundled together within it and violates the principles of proportionality. Similar offences already exist under the Penal Code, 1860 which applies to online content equally. These offences have definitions and ingredients providing adequate notice. This is not so in the case of Section 66-A which merely contains phrases. Hence, this also leads to a mixing up of major and minor offences, in a bundle of phrases under Section 66-A leading to the same penal consequences. In support of the above proposition, case law is cited below:

- d (a) *Vide Om Kumar v. Union of India*, (2001) 2 SCC 386 : 2000 Supp (4) SCR 693]

- e "On account of a chapter on Fundamental Rights in Part III of our Constitution right from 1950, Indian courts did not suffer from the disability similar to the one experienced by English courts for declaring as unconstitutional legislation on the principles of proportionality or reading them in a manner consistent with the charter of rights. Ever since 1950, the principle of "proportionality" has indeed been applied vigorously to legislative (and administrative) action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India—such as freedom of speech and expression, freedom to assemble peacefully, freedom to form associations and unions...."

- f 8. International covenants to which India is a party such as ICCPR have been interpreted with respect to the access on the internet. Specific reference is made to the summary of recommendations of the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, dated 6-5-2011, which are quoted at length:

- g "The Special Rapporteur believes that the internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies. Indeed, the recent wave of demonstrations in countries across the Middle East and

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V. Mr Sanjay Parikh, Advocate, for the petitioner (*contd.*)

North African region has shown the key role that the internet can play in mobilising the population to call for justice, equality, accountability and better respect for human rights. As such, facilitating access to the internet for all individuals, with as little restriction to online content as possible, should be a priority for all States." a

9. The expressions which have been used in Section 66-A have not been defined. This can be compared with Section 66 where the terms "dishonestly" and "fraudulently" have been defined and given them the same meaning as provided in IPC. In Sections 66-B, 66-C, 66-D, 66-E, 66-F, 67, 67-A and 67-B the offence for which punishment has been provided has been defined. However, in Section 66-A, the expression "grossly offensive, menacing character, annoyance, inconvenience, danger, obstruction, insult, etc. have not been defined. These expressions are absolutely vague and are subjected to different interpretations. None of these expressions can be extended to the logical conclusion mainly that an information which is grossly offensive or has menacing character will either cause incitement of an offence or public disorder. It is only by imaginations and subjective inputs that a nexus will have to be established with the exceptions contained in Article 19(2). What can cause annoyance to a person may not cause annoyance to another; the subject-matter which is alleged to cause annoyance can be totally innocuous. It can also be meaningful and objectionable. But Article 19(1)(a) does not allow the distant, imaginative interpretations to bring an expression within Article 19(2). It is for this reason that Section 66-A violates Article 19(1)(a). It is not permissible to bring in the definitions given in different IPC offences for upholding Section 66-A. b c d e

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates,  
for the petitioner, Anoop M.K. in WP (Crl.) No. 196/2014

*The challenge*

1. This petition impugns Sections 66-A, 69-A and 80 of the IT Act, 2000 as well as Section 118(d) of the Kerala Police Act, 2011. Two FIRs dated 25-1-2014 and 13-6-2014 were registered against the petitioner for separate instances of using social media as an activist platform. The petitioner has been arrested separately in connection with both FIRs. f

*Propositions*

2. (I) Section 66-A violates Articles 19, 14 and 21 of the Constitution. g

(II) Section 69-A violates Articles 14 and 19 of the Constitution.

(III) Section 80 violates Article 21 of the Constitution and derogates from the safeguards offered by Section 41-A CrPC.

(IV) Section 118(d) of the Kerala Police Act lacks legislative competence and is also violative of Articles 14 and 21 of the Constitution. h



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Summary of Arguments

VI. Mr. Gopal Sankaranarayanan and Mr. Renjith Murar, Advocates, for the petitioner (contd.)

a I. The validity of Section 66-A, IT Act

3. Section 66-A is not traceable to any of the grounds laid down in Article 19(2):

3.1. If the law is not traceable to the grounds under Article 19(2), then it falls foul of Article 19(1)(a). (See Note 1)

b 3.2. Decency is based on "current standards of behaviour or propriety" (See Note 2)

3.3. Public order is in any case an exclusive State subject being Entry 1, List II of Schedule VII. If the provision is sought to be justified on this ground, then it is void for competence. (See Note 2)

c 3.4. The onus is hence on the respondent to show any other ground to which the legislation is traceable.

4. Without prejudice, Section 66-A imposes restrictions that are not reasonable: (See Note 2)

4.1. The threshold is low, subjective and undefined.

4.2. The punishment is disproportionate.

d 4.3. If the same provisions were applied to the non-online media, the consequences would be egregious. (See Note 5)

5. Section 66-A is over broad and endows uncanalised powers of determination on the authorised police officer, thereby violating Article 14. (See Note 3)

e 6. Section 66-A creates a penal offence without the ingredients of *mens rea*, thereby breaching Article 21. This provision also makes no distinction between those who maliciously offend and those who innocently do so. (See *Mithu v. State of Punjab*, (1983) 2 SCC 277)

II. The validity of Section 69-A, IT Act

f 7. As far as Section 69-A is concerned, it impinges not only the owner/author's right to speech and expression but also the right to information of users under Article 19(1)(a) is deprived when access is taken away. Particularly in the context of foreign sites and websites, owners/authors of such content may not be particularly concerned about the block. (See Note 6)

8. Section 69-A endows uncanalised powers on the Central Government which violates Article 14: (See Note 3)

g 8.1. "Satisfied" that it is "necessary" is entirely subjective and leaves the determination solely to the Central Government or its authorised officer without an objective standard.

h 8.2. There is a complete departure from the principles of natural justice as the blocking direction follows immediately upon the subjective satisfaction of the officer without any notice or advertence to the author/uploader of the content. (See *State of Madras v. V.G. Row*, 1952 SCR 597)

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9. Section 69-A merely reproduces the grounds in Article 19(2) without providing guidance regarding their interpretation or application: <sup>a</sup>

9.1. The grounds under Article 19(2) are the basis for justifying a law that infringes free speech. The same cannot also be a parameter for determining the grounds for blocking without some objective parameters or guidelines that clarify exactly the scope of *security of the State, public order, friendly relations with States*, etc. <sup>b</sup>

9.2. These terms are not exhaustive or interpreted by settled enumeration. When the occasion arises, the judiciary is regularly called upon to adjudicate their meaning.

9.3. It is Parliament's essential function to provide guidance to the executive on the manner of their interpretation. This includes setting down a legislative policy in sufficient clearness (lacking in Section 69-A), or laying down a standard to be followed (also lacking). <sup>c</sup>

9.4. The "reasonableness" test under Article 19(2) is wholly lost sight of, with Parliament presuming that the arbitrary and uncanalised exercise of such determination by an authorised officer would be, for some reason, reasonable. <sup>d</sup>

9.5. If the same provision were applied to the non-online media, the consequences would again be egregious. (See Note 5)

10. As far as online transactions are concerned, a separate argument under Article 19(1)(g) may also be canvassed by those who run online trades and businesses. <sup>e</sup>

### III. The validity of Section 80, IT Act

11. There has been a substantial evolution on the law governing arrest in the country, which has involved Reports of the Law Commission, Guidelines of this Hon'ble Court and Amendments to CrPC. Parliament has lost sight of all these facts in enacting the present provision. (See Note 4) <sup>f</sup>

12. The power of arrest and search is gratuitously endowed without any safeguards as is available in the Code of Criminal Procedure, 1973. In fact, CrPC is explicitly referred to courtesy the non obstante clause.

13. The procedure is not just, fair and reasonable and hence violates Article 21.

14. The provision is inconsistent with the Guidelines laid down by this Hon'ble Court in *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260. <sup>g</sup>

15. Anomalies are likely with different laws for different media.

### IV. The validity of Section 118(d), Kerala Police Act

16. The Kerala State Legislature lacked the legislative competence to enact Section 118(d) as it is covered by Entries 31 and 93 of List I. <sup>h</sup>

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner (contd.)

- a 17. In any event, the field is occupied by the Central legislation, the IT Act, where Section 66-A came into effect on 27-10-2009 via Amendment Act 10 of 2009. The Kerala Police Act came into effect on 27-4-2011.
18. Without prejudice, the section must either be read down or the offending portions severed. See *State of Karnataka v. Ranganatha Reddy*, (1977) 4 SCC 471 [7-JJ]
- b 19. The provision creates a penal offence without the ingredients of *mens rea*, thereby breaching Articles 19 and 21.

V. Scope of Article 19(2)

*Must be traced to the grounds in Article 19(2)*

- c 20. *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 (5-Judge Bench) — Regulating and prescribing the number of pages and advertisements in a newspaper on the grounds of welfare of the public rejected as not traceable to Article 19(2).
21. *Bennett Coleman & Co. v. Union of India*, (1972) 2 SCC 788 (5-Judge Bench) — Object of newspaper restrictions had nothing to do with availability of newsprint or foreign exchange. Hence, restrictions outside Article 19(2).
- d 22. *Supt., Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 (5-Judge Bench) — Section 3 of the U.P. Special Powers Act proscribed even innocuous speeches and held not to be justified under "public order" and in any case not reasonable.
- e *Must be reasonable*
23. *State of Madras v. V.G. Row*, 1952 SCR 597 (5-Judge Bench) — The Criminal Law Amendment Act of Madras allowed the provincial Government to unilaterally declare any association as unlawful and declare as such in the Gazette. The challenge succeeded as unreasonable in its restraint of Article 19(1)(c) as it excluded judicial enquiry, *did not communicate to the affected party* to enable a representation and did not provide a time-limit.
- f 24. *Virendra v. State of Punjab*, 1958 SCR 308 (5-Judge Bench) — No time-limit for the operation of the order nor for representation to the State Government makes Section 3 of the Punjab Special Powers (Press) Act unreasonable.
- g 25. *State of M.P. v. Baldeo Prasad*, (1961) 1 SCR 970 — Definition of "goonda" is over broad and unguided, and hence unreasonable in its restraint of Articles 19(1)(d) and (e) of the Constitution.
26. *Kishan Chand Arora v. Commr. of Police*, (1961) 3 SCR 135 — Licences for eating houses endowed the Commissioner with unreasonable powers which the majority held was invalid as violating Section 19(1)(g).
- h 27. *Dwarka Prasad Lakshmi Narain v. State of U.P.*, 1954 SCR 803 — Power over licences under the U.P. Coal Control Order were held to be

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unreasonable and violating Article 19(1)(g) even though reasons were to be recorded in writing. <sup>a</sup>

#### VI. On Decency and Public Order

28. *Ramesh Yeshwant Prabhu v. Prabhakar Kashinath Kunte*, (1996) 1 SCC 130 — Section 123(3) of the Representation of the People Act challenged as violating Article 19(1)(a) as it prohibited seeking of votes on the ground of religion. <sup>b</sup>

"28. The expression 'in the interests of' used in clause (2) of Article 19 indicates a wide amplitude of the permissible law which can be enacted to provide for reasonable restrictions on the exercise of this right under one of the heads specified therein, in conformity with the constitutional scheme. Two of the heads mentioned are: decency or morality. Thus, any law which imposes reasonable restrictions on the exercise of this right in the interests of decency or morality is also saved by clause (2) of Article 19. Shri Jethmalani contended that the words 'decency or morality' relate to sexual morality alone. In view of the expression 'in the interests of' and the context of election campaign for a free and fair poll, the right to contest the election being statutory and subject to the provisions of the statute, the words 'decency or morality' do not require a narrow or pedantic meaning to be given to these words. The dictionary meaning of 'decency' is 'correct and tasteful standards of behaviour as generally accepted; conformity with current standards of behaviour or propriety; avoidance of obscenity; and the requirements of correct behaviour' (*The Oxford Encyclopaedic English Dictionary*); 'conformity to the prevailing standards of propriety, morality, modesty, etc.; and the quality of being decent' (*Collins English Dictionary*) <sup>c</sup>

29. Thus, the ordinary dictionary meaning of 'decency' indicates that the action must be in conformity with the current standards of behaviour or propriety, etc. In a secular polity, the requirement of correct behaviour or propriety is that an appeal for votes should not be made on the ground of the candidate's religion which by itself is no index of the suitability of a candidate for membership of the House. In *Kneller (Publishing, Printing and Promotions) Ltd. v. Director of Public Prosecutions*, (1972) 2 All ER 898, the meaning of 'indecent' was indicated as under: (All ER p. 905) <sup>d</sup>

'... Indecency is not confined to sexual indecency; indeed it is difficult to find any limit short of saying that it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting....' <sup>e</sup>

Thus, seeking votes at an election on the ground of the candidate's religion in a secular State, is against the norms of decency and propriety of the society." <sup>f</sup>

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- a 29. *Rev. Stainislaus v. State of M.P.*, (1977) 1 SCC 677 (5-Judge Bench) — Constitutionality of the M.P. and Orissa Acts was challenged on the ground that legislatures lack the legislative competence to enact such provisions as they relate to matters of religion falling within the residuary Entry 97 of List I.
- b "24. The expression "public order" is of wide connotation. It must have the connotation which it is meant to provide as the very first Entry in List II. It has been held by this Court in *Romesh Thappar v. State of Madras*, 1950 SCR 594, that 'public order' is an expression of wide connotation and signifies state of tranquillity which prevails among the members of a political society as a result of internal regulations enforced by the Government which they have established.
- c 25. Reference may also be made to the decision in *Ranjilal Modi v. State of U.P.*, 1957 SCR 860, where this Court has held that the right of freedom of religion guaranteed by Articles 25 and 26 of the Constitution is expressly made subject to public order, morality and health, and that
- d "it cannot be predicated that freedom of religion can have no bearing whatever on the maintenance of public order or that a law creating an offence relating to religion cannot under any circumstances be said to have been enacted in the interests of public order."
- e It has been held that these two articles in terms contemplate that restrictions may be imposed on the rights guaranteed by them in the interests of public order. Reference may as well be made to the decision in *Arun Ghosh v. State of W.B.*, (1970) 1 SCC 98, where it has been held that if a thing disturbs the current of the life of the community, and does not merely affect an individual, it would amount to disturbance of the public order. Thus, if an attempt is made to raise communal passions, e.g. on the ground that someone has been 'forcibly' converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large. *The impugned Acts, therefore, fall within the purview of Entry 1 of List II of the Seventh Schedule as they are meant to avoid disturbances to the public order by prohibiting conversion from one religion to another in a manner reprehensible to the conscience of the community.* The two Acts do not provide for the regulation of religion and we do not find any
- f justification for the argument that they fall under Entry 97 of List I of the Seventh Schedule."
- g

VII. Uncanalised power

30. *Delhi Laws Act case*, AIR 1951 SC 332 (7-Judge Bench) — Empowering the Central Government to extend Part A State laws to Part C States with any modification as it deems fit

h (Kania, C.J., Mahajan, Mukherjea, JJ's opinions)

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31. *State of W.B. v. Anwar Ali Sarkar*, 1952 SCR 284 (7-Judge Bench) — Discretion given to the State Government to direct a case or class of cases to be tried by the Special Court. a

(Fazl Ali, Mahajan, Mukherjea, Aiyar and Bose, JJ. in Majority)

32. *Air India v. Nergesh Meerza*, (1981) 4 SCC 335 — Retirement age of air hostesses to be extended at the will of the Managing Director b

(Paras 115-20)

33. *District Registrar & Collector v. Canara Bank*, (2005) 1 SCC 496 — Amended Section 73 of the A.P. Stamp Act permits inspection and seizure of documents which may even be in private custody.

(Paras 54, 57-58)

34. *Subramanian Swamy v. CBI*, (2014) 8 SCC 682 (5-Judge Bench) — The validity of Section 6-A of the DSPE Act c

(Paras 46 and 49)

### VIII. The evolution of the arrest safeguards

#### A. The 177th Report of the Law Commission

35. Section 41-A in its present form came into being on the recommendations of the 177th Report of the Law Commission submitted in December 2001. Repeatedly, the Report seeks to maintain a balance between individual liberty and societal order while exploring the manner in which the police exercises the power of arrest, provisions of which are contained in Chapter V of the Code. d

36. The Law Commission at pp. 33-38 discussed the well-settled propositions enunciated by this Hon'ble Court in *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260 which referred to the recommendations of the *Third Report of the National Police Commission (1980)* at Paras 12 and 20 and incorporated them as directions to be followed in all cases of arrest. e

37. The Commission then considers at pp. 38-41 the decision in *D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 where further directions are given to ensure transparency and accountability when arrests are carried out. These directions and the consequences of their non-observance are laid down at paras 34 to 39 of the judgment. f

*Note.*—For the purposes of the present case, the directions in *Joginder Kumar* would be more relevant as it concerns the criteria for arrest, while *D.K. Basu* deals with the circumstances once the decision to arrest has been taken [A'la Miranda]. g

38. Interestingly, the Commission notes that Section 41-A was recommended as an insertion by the earlier 152nd and 154th Reports of the Law Commission in 1994, which sought to give the *Joginder Kumar* directions a statutory flavour.

39. The Commission invites detailed comments from practitioners, academics, police officers and other experts before considering the flaws in h

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- a Section 41 and the lack of safeguards therein. Specifically at pp. 92 and 93 the Commission questions the silence in the statute with regard to safeguards against arbitrary exercise of arrest powers by the police.

40. In pursuance of its recommendations, the Commission appends as Annexure 1 (pp. 130-46) a Draft CrPC Amendment Act which inter alia provides for an amended Section 41 and the insertion of new Sections 41-A to 41-D.

- b

*B. The amendments to CrPC — 2008 and 2010*

41. Although the 177th Report was submitted to the Government in 2001, it was not until 7th January 2009 that the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) was passed, inter alia, amending Section 41 and inserting new Sections 41-A, 41-B, 41-C and 41-D.

- c 42. Not long thereafter, the Government passed the Code of Criminal Procedure (Amendment) Act, 2010 (Act 41 of 2010) which amended Section 41 to add the requirement that a police officer would record the reasons for *not* making an arrest as well. Also, Section 41-A was amended by substituting "shall" for "may", thereby making the issue of notice mandatory where an arrest was not being made under Section 41(1)(b).

- d 43. Pursuant to this, the police headquarters in the various State Governments have issued directives to its personnel in compliance with the new provisions. This includes the circulation of a pro forma notice under Section 41-A of the Code.

*C. Judicial interpretation*

- e 44. Being of recent vintage, the newly inserted sections have fallen for consideration before this Hon'ble Court only in January 2014:

- f 44.1. *Hema Mishra v. State of U.P.*, (2014) 4 SCC 453: While ruling that the powers under Article 226 ought to be exercised exceptionally in granting pre-arrest bail in Uttar Pradesh, and in cautioning that this ought not to be converted into the hitherto omitted Section 438 jurisdiction, the concurring judgment of Sikri, J. states as follows at para 31:

- g "31. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardized and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardizing the State objective of maintenance of law and order."

- h In addition, there are two earlier decisions which have a bearing on the exercise of discretion by the police officer as to whether an arrest should be made.

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44.2. *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694: In describing irrational arrests as a violation of human rights, the Court suggested certain other avenues of averting arrest at paras 115-18: a

"115. In *Joginder Kumar case* a three-Judge Bench of this Court has referred to the 3rd Report of the National Police Commission, in which it is mentioned that the quality of arrests by the police in India mentioned the power of arrest as one of the chief sources of corruption in the police. The Report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. b

116. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case. c

117. In case, the State considers the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive:

(1) Direct the accused to join the investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested. d

(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the fixed deposit receipts/ share certificates of the accused.

(3) Direct the accused to execute bonds.

(4) The accused may be directed to furnish sureties of a number of persons which according to the prosecution are necessary in view of the facts of the particular case. e

(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided. f

(6) Bank accounts be frozen for small duration during the investigation.

118. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer." g

44.3. *Lalita Kumari v. State of U.P.*, (2014) 2 SCC 1: While considering whether registration of FIRs in cognizable cases is compulsory, the h



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- a Constitution Bench dealt with the argument that compulsory registration will lead to compulsory arrest in the following manner:

"106. Another stimulating argument raised in support of preliminary inquiry is that mandatory registration of FIRs will lead to arbitrary arrest, which will directly be in contravention of Article 21 of the Constitution.

- b 107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for 'anticipatory bail' under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he can avoid the arrest under that provision by obtaining an order from the court.

108. It is also relevant to note that in *Joginder Kumar v. State of U.P.*, this Court has held that arrest cannot be made by the police in a routine manner. Some important observations are reproduced as under:

- d "20. ... No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

- e  
f  
g 109. The registration of FIR under Section 154 of the Code and arrest of an accused person under Section 41 are two entirely different things. It is not correct to say that just because FIR is registered, the accused person can be arrested immediately.<sup>1</sup> It is the imaginary fear that 'merely because FIR has been registered, it would require arrest of the

h <sup>1</sup> This had earlier been the view of the 7-Judge Allahabad High Court Full Bench in *Amarawati v. State of U.P.*, 2005 Cr IJ 755 at paras 18-20 after following the judgment in *Joginder Kumar*. This Full Bench decision was approved and followed by this Hon'ble Court in *Lal Kamendra Pratap Singh v. State of U.P.*, (2009) 4 SCC 437.

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accused and thereby leading to loss of his reputation' and it should not be allowed by this Court to hold that registration of FIR is not mandatory to avoid such inconvenience to some persons. *The remedy lies in strictly enforcing the safeguards available against arbitrary arrests made by the police and not in allowing the police to avoid mandatory registration of FIR when the information discloses commission of a cognizable offence.* a

**D. Narrowing the scope of Section 41** b

45. The *cognizability* of an offence and the need to arrest the perpetrator of that offence are essentially two sides of the same coin. The reasons why certain offences are categorised as cognizable is so that the police officer may incapacitate the offender (through arrest) from either continuing to offend (recidivism), causing the disappearance of evidence, the intimidation of witnesses or flight from justice. c

46. *Cognizability* has little to do with the quantum of punishment prescribed by the Code. An apposite illustration is available in the form of Chapters XX and XXI of the IPC dealing with offences concerning marriage and cruelty by husband and kin. While Sections 494 to 497 prescribe punishments of between 5 and 10 years, they are all non-cognizable and bailable. However, Section 66-A of the IT Act prescribes only a 3-year punishment, but is cognizable. d

47. The discretion of the police officer under Section 41 must therefore be infused with the relevant considerations for cognizability i.e. the likelihood of recidivism, the unlikelihood of securing his presence and to prevent him from tampering with evidence or influence witnesses. It is these factors that continue to be the bulwark of bail jurisprudence, thereby offering integrity to the criminal justice process. However, it is Section 41(1)(b)(ii)(b) alone that offers avenues of abuse with its over broad wording — "for proper investigation of the offence". Unless this sub-clause is interpreted narrowly to be limited to the requirement for custodial interrogation, several of the accused would find themselves incarcerated for collateral purposes, with the onus on the police officer in question merely to parrot the phrase — "arrest required for proper investigation of the case". e

48. Such an interpretation would also encourage Section 41 being invoked in very few cases, with the softer option peddled by Section 41-A being given priority. f

**E. The UK experience** g

49. Due to concerns about the prosecution of offences under Section 127(1)(a) of the Malicious Communication Act, 2003, following *Chambers v. DPP*, (2012) 1 WLR 1833 the CPS issued "interim guidelines on prosecuting cases involving communications sent via social media". h

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a IX. The IT Act — Contrast with the real world

	Impugned provision	Real World Illustration
b	Section 66-A, IT Act	(i) A writes a particularly passionate letter to his sweetheart B and posts it to her address. Unfortunately, B's father C opens the envelope and reads the letter. Unsurprisingly, he is grossly offended by it. A is arrested forthwith on a complaint by C and upon conviction, sentenced to 3 years in prison.
c		(ii) Candidate D has been piqued by his rival E's stranglehold over a particular constituency. In order to make inroads at the coming elections, he distributes leaflets falsely claiming that E, despite projecting himself as a frugal vegetarian eats chicken on the sly. On E's complaint, D is arrested and upon conviction faces 3 years in jail.
d		(iii) A company F has a stall at the trade fair to which it seeks to attract visitors. It distributes unsolicited letters at houses across New Delhi inviting residents to visit the trade fair, but provides a wrong sender's address. On a resident's complaint, the Managing Director of F is arrested and faces 3 years in prison.
e	Section 69-A, IT Act	
f		(i) J, an Event Manager for an international concert buys television airtime to advertise the grand show to be held the following weekend. K, the Minister for Youth Affairs who has for long despised J, gives instructions to Prasar Bharati to block the advertisement on all channels. The show has a poor response and J suffers huge losses.
g		(ii) M, a respected political commentator is to have the book launch of his new work on human rights violations in the Gaza Strip. N, the Minister for External Affairs directs the publishers to immediately stop printing and has all copies of the book confiscated claiming that it would affect friendly relations with Israel. M goes into depression and commits suicide.
h		

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X. Select list of blocked links in 2012

[Source: The Centre for Internet and Society, Bangalore]

Domain	Total number of entries	Tuesday, 21-8-2012	Monday, 20-8-2012	Sunday, 19-8-2012	Saturday, 18-8-2012
ABC.net.au	1				1
AlJazeera.com	4		4		
AllVoices.com	1				1
WN.com	1				1
AjchCyber.net	1				1
BDCBurma.org	1	1			
Bhaskar.com	1			1	
Blogspot.com	4			3	1
Blogspot.in	7	1	3		3
Catholic.org	1			1	
CentreRight.in	2	2			
ColumnPK.com	1			1	
Defence.pk	4		2	1	1
EthioMuslimsMedia.com	1				1
Facebook.com (HTTP)	75	36	7	18	14
Facebook.com (HTTPS)	27		3	23	1
Parazahmed.com	5	1			4
Firstpost.com	2		1	1	
HaindavaKeralam.com	1			1	
HiddenHarmonies.org	1		1		
HinduJagruti.org	2		1	1	
Hotklix.com	1			1	
HumanRights-Iran.ir	2				2
Intichat.com	1	1			
Irawady.org	1			1	
IslamabadTimesOnline.com	1				1
Issuo.com	1				1
JafriaNews.com	1				1
JihadWatch.org	2		2		
KavkazCenter	1			1	
MwmJawan.com	1				1
MyOpera.com	1	1			
Njuice.com	1		1		
OnIslam.net	1				1
PakAlertPress.com	1	1			

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a	Plus.Google.com	4				4
	Reddit.com	1		1		
	Rina.in	1				1
	SandcepWeb.com	1		1		
	SEAYouthSaySo.com	1				1
b	Sheikyenmami.com	1				1
	Stormfront.org	1				1
	Telegraph.co.uk	1				1
	TheDailyNewsEgypt.com	1				1
	TheFaultLines.com	1				1
c	ThePetitionSite.com	1	1			
	TheUnity.org	1				1
	TimesofIndia.Indiatimes.com	1		1		
	TimesOfUmmah.com	1				1
	Tribune.com.pk	1	1			
d	Twitter.com (HTTP)	1			1	
	Twitter.com (HTTPS)	11			1	10
	Twitter account	18		16	2	
	TwoCircles.net	2			2	
	Typepad.com	1		1		
e	Vidiov.info	1		1		
	Wikipedia.org	3			3	
	Wordpress.com	8	1	3	2	2
	YouTube.com	85	18	39	14	14
	YouTu.be	1			1	
Totals		309	65	88	80	75

The above analysis has been cross-posted/quoted in the following places:

- f
1. LiveMint (4-9-2012)
  2. The Hindu (26-8-2012)
  3. Wall Street Journal (25-8-2012)
  4. tech 2 (25-8-2012)
  5. China Post (25-8-2012)
- g
6. The Hindu (24-8-2012)
  7. LiveMint (24-8-2012)
  8. Global Voices (24-8-2012)
  9. Reuters (24-8-2012)
  10. Outlook (23-8-2012)
- h
11. FirstPost.India (23-8-2012)

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12. IBN Live (23-8-2012) a

13. News Click (23-8-2012)

14. Medianama (23-8-2012)

15. KAFILA (23-8-2012)

16. CIOL (23-8-2012) b

XI. The proclaimed aim of the IT Amendment Act, 2008

*Objects and Reasons of the IT (Amendment) Act, 2008*

50. The Information Technology Act was enacted in the year 2000 with a view to give a fillip to the growth of electronic based transactions, to provide legal recognition for e-commerce and e-transactions, to facilitate e-governance, to prevent computer based crimes and ensure security practices and procedures in the context of widest possible use of information technology worldwide. c

51. With proliferation of information technology enabled services such as e-governance, e-commerce and e-transactions; data security, data privacy and implementation of security practices and procedures relating to these applications of electronic communications have assumed greater importance and they required harmonisation with the provisions of the Information Technology Act. Further, protection of Critical Information Infrastructure is pivotal to national security, economy, public health and safety, thus, it had become necessary to declare such infrastructure as protected system, so as to restrict unauthorised access. d e

52. Further, a rapid increase in the use of computer and internet has given rise to new forms of crimes like, sending offensive emails and multimedia messages, child pornography, cyber terrorism, publishing sexually explicit materials in electronic form, video voyeurism, breach of confidentiality and leakage of data by intermediary, e-commerce frauds like cheating by personation—commonly known as phishing, identity theft, frauds on online auction sites, etc. So, penal provisions were required to be included in the Information Technology Act, 2000. Also, the Act needed to be technology-neutral to provide for alternative technology of electronic signature for bringing harmonisation with Model Law on Electronic Signatures adopted by United Nations Commission on International Trade Law (UNCITRAL). f g

53. Keeping in view the above, the Government had introduced the Information Technology (Amendment) Bill, 2006 in the Lok Sabha on 15-12-2006. Both Houses of Parliament passed the Bill on 23-12-2008. Subsequently the Information Technology (Amendment) Act, 2008 received the assent of President on 5-2-2009 and was notified in the Gazette of India. h

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Summary of Arguments

VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner (contd.)

a

XII. Cyber crime units in India

54. The 2011 NASSCOM Cyber Crime Investigation Manual lists out the major cyber crime units in India and their jurisdictions. 22 States and 2 Union Territories are covered by this.

b

55. A Notification of Karnataka State dated 13-9-2001 suggests that the designation of a particular office of the police is notified under Section 2(s) CrPC as the cyber crime police station for offences under the IT Act in the specified areas falling thereunder.

*Brief supplementary submissions*

*Section 66-A*

c

56. Is not traceable to the grounds<sup>2</sup> under Article 19(2), and hence falls foul of Article 19(1)(a). Public order is a State subject<sup>3</sup> and cannot be a justification.

d

57. Is not reasonable<sup>4</sup> as the threshold is *subjective and undefined*<sup>5</sup>; as it creates a *criminal* offence; as it is based on the *subjective sensitivity* of 1.25 billion people; has *no mens rea* requirement; offers *no safeguards* unlike the 10 exceptions in Section 499 IPC; and carries *no procedural protection* unlike the complaint mechanism in Section 199 CrPC.

e

58. Is violative of Article 14 as it *unreasonably classifies*<sup>6</sup> internet users (about 150 million) and their content from the non-internet with no rational nexus to the harm to be caused (presumably defamation and hurting of sentiments). The punishment for internet users is 3 years and cognizable, while for non-internet users is 2 years and non-cognizable. Under the present regime, prosecutions may be initiated under both statutes for the same act, and culminate in separate convictions, thereby infringing Article 20(2) as well.

59. Is also in breach of Article 14 as it is over broad and endows uncanalised powers<sup>7</sup> of determination on the authorised police officer.

60. Is not being abused in its exercise, but when strictly applied by the police has egregious consequences.

f

*Section 69-A*

61. Is violative of Article 19(1)(a) as it merely reproduces the grounds of Article 19(2) but does not satisfy the reasonableness requirement. Mere recording of reasons in writing does not satisfy the reasonableness threshold<sup>8</sup>.

g

2 *Sakal Papers (P) Ltd. v. Union of India*, (1962) 3 SCR 842 and *Bennett Coleman and Co. v. Union of India*, (1972) 2 SCC 788

3 Entry 1, List II, Schedule VII

4 *State of Madras v. V.G. Row*, 1952 SCR 597

5 *State of M.P. v. Baldeo Prasad*, (1961) 1 SCR 970

6 *Ram Krishna Dalmia v. S.R. Tendolkar*, 1959 SCR 279; *Subramanian Swamy v. CBI*, (2014) 8 SCC 682

h

7 *State of W.B. v. Anwar Ali Sarkar*, 1952 SCR 284 (Per Fazl Ali, Mahajan, Mukherjee, Aiyar & Bose, JJ.); *Air India v. Nergesh Meerza*, (1981) 4 SCC 335;

8 *Dwarka Prasad Lakshmi Narain v. State of U.P.*, 1954 SCR 803

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VI. Mr Gopal Sankaranarayanan and Mr Renjith Marar, Advocates, for the petitioner (contd.)

62. Is in breach of Article 14 as it endows *uncanalised and unguided* powers on the Central Government to be "satisfied" that it is "necessary or expedient" to block a site; does *not offer notice or communication* to the owner of the content; does *not follow the principle of audi alteram partem* and does *not provide an avenue of appeal*. <sup>a</sup>

63. Is also an infringement of Article 14 as it *unreasonably classifies* internet users by blocking their content while non-internet users suffer no such consequences. In addition, Sections 95 and 96 CrPC lay down strict and limited circumstances in which content may be forfeited, and with a detailed procedure of applying to the Special Bench of the High Court for redress. <sup>b</sup>

Section 80

64. Is a clear infringement of Articles 14 and 21 as it provides for no safeguards from the exercise of arrest power unlike Sections 41 and 41-A CrPC. Once again it provides for unreasonable classification. <sup>c</sup>

65. Is a throwback to the past, rolling back several decades of progress in arrest jurisprudence. Contrary to observations on safeguards in *Lalita Kumari v. State of U.P.*, (2014) 2 SCC 1 at paras 106-109. <sup>d</sup>

66. Is inconsistent with the Guidelines laid down in *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260.

67. Due to concerns about the prosecution of offences under Section 127(1)(a) of the Malicious Communication Act, 2003, following *Chambers v. DPP*, (2012) 1 WLR 1833 the CPS issued "interim guidelines on prosecuting cases involving communications sent via social media". <sup>e</sup>

Section 118(d), Kerala Police Act

68. Is void under Article 254 as it is a provision pursuant to Entry 1, List III of Schedule VII, which is repugnant to Section 66-A of the IT Act. Section 66-A came into effect on 27-10-2009 via Amendment Act 10 of 2009. The Kerala Police Act came into effect on 27-4-2011 and has not been granted Presidential assent.<sup>9</sup> <sup>f</sup>

69. Is without prejudice void, as the Kerala State Legislature lacked the legislative competence to enact the law because violations (*offences*) through the medium (*means of communication*) are covered by Entries 31 and 93 of List I. <sup>g</sup>

70. Without prejudice, the section must either be read down or the offending portions severed.<sup>10</sup>

<sup>9</sup> *Deep Chand v. State of U.P.*, 1959 Supp (2) SCR 8 <sup>h</sup>

<sup>10</sup> *State of Karnataka v. Ranganatha Reddy*, (1977) 4 SCC 471 at para 36



Summary of Arguments (contd.)

VII. Mr Tushar Mehta, Additional Solicitor General,  
for the Union of India

a

I. On Freedom of Speech and Expression as contemplated under  
Article 19(1)(a) read with Article 19(2) in the context  
of Information Technology Act

b

1. The first judgments in the point of time were judgments in *Romesh Thappar v. State of Madras*, (1950 SCR 595)<sup>1</sup> (Constitution Bench judgment) and *Brij Bhushan v. State of Delhi*, (1950 SCR 605)<sup>2</sup> (Constitution Bench judgment). These judgments were in the context of Article 19(2) as it stood before the Constitution (First Amendment) Act, 1951.

c

2. On 18-6-1951, the Constitution (First Amendment) Act, 1951 was brought in, amending Article 19(2) of the Constitution of India. Both the above judgments of the Constitution Bench and amendment in Article 19(2) was first considered by the High Court of Patna in the judgment in *AIR 1954 Pat 254*,<sup>3</sup> more particularly in the context of the term "in the interest of" used in the amended Article 19(2).

d

3. In the said judgment, the Patna High Court (through Das, C.J. who thereafter delivered the judgment presiding over a Constitution Bench of this Hon'ble Court) considered the judgment of this Hon'ble Court in *State of Madras v. V.G. Row* (AIR 1952 SC 196) and quoted from the said judgment as under:

e

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."<sup>4</sup> (emphasis supplied)

f

g

1 Pp. 1-12, *Compilation of Judgments*, Vol. VI

2 Pp. 13-28, *Compilation of Judgments*, Vol. VI

3 Pp. 50-65, *Compilation of Judgments*, Vol. VI

4 P. 60. *Compilation of Judgments*, Vol. VI

h

Summary of Arguments

VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India (*contd.*)

4. All the above-referred judgments came to be considered by this Hon'ble Court in *Ranji Lal Modi v. State of U.P.*, (1957 SCR 860)<sup>5</sup> (Constitution Bench judgment). The following important facets emerged from the said judgment:

(i) This judgment pertained to a magazine as a medium;

(ii) This Hon'ble Court held that that term "in the interest of" would apply to each phrase used in Article 19(2);

(iii) This Hon'ble Court rejected the argument that so long as the possibility of the law being applied for the purposes not sanctioned by the Constitution, cannot be ruled out, the entire law should be held to be unconstitutional;

(iv) This Hon'ble Court held that Section 295-A to be constitutional since it is made "in the interest of" public order.

5. In the judgment in *Virendra v. State of Punjab*, (1957 SCR 308)<sup>6</sup> (Constitution Bench judgment), this Hon'ble Court considered the previous judgments, in the context of print media vis-à-vis Article 19(1)(a). Important facets of the said judgment are as under:

(i) In this case the contention under Article 19(1)(a) arose in case of newspaper which was banned in one State.

(ii) This Hon'ble Court reiterated that the term "in the interest of" are words of great amplitude and are much wider than the words "for the maintenance of" used in Article 19(2) prior to the first amendment.

(iii) This Hon'ble Court, inter alia, has observed as under:

"It cannot be overlooked that the Press is a mighty institution wielding enormous powers which are expected to be exercised for the protection and the good of the people but which, may conceivably be abused and exercised for anti-social purposes by exciting the passions and prejudices of a section of the people against another section and thereby disturbing the public order and tranquillity or in support of a policy which may be of a subversive character. *The powerful influence of the newspapers, for good or evil, on the minds of the readers, the wide sweep of their reach, the modern facilities for their swift circulation to territories, distant and near, must all enter into the judicial verdict and the reasonableness of the restrictions imposed upon the Press has to be tested against this background.* It is certainly a serious encroachment on the valuable and cherished right to freedom of speech and expression if a newspaper is prevented from publishing its own views or the views of its correspondents relating to or concerning what may be the burning topic of the day. *Our social interest ordinarily demands the*

5 Pp. 66-74, *Compilation of Judgments*, Vol. VI

6 Pp. 75-95, *Compilation of Judgments*, Vol. VI

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- a *free propagation and interchange of views but circumstances may arise when the social interest in public order may require a reasonable subordination of the social interest in free speech and expression to the needs of our social interest in public order. Our Constitution recognises this necessity and has attempted to strike a balance between the two social interests. It permits the imposition of reasonable restrictions on the freedom of speech and expression in the interest of public order and on the freedom of carrying on trade or business in the interest of the general public.*<sup>7</sup>
- b

- c (iv) This Court again considered the width and amplitude of Article 19(2) in the judgment in *Supt., Central Prison v. Ram Manohar Lohia*, (AIR 1960 SC 633)<sup>8</sup>. In the said judgment, the Hon'ble Court considered its earlier views from *Romesh Thappar* judgment down the line. The salient features of this judgment are as under:

(a) This Hon'ble Court again considered the amplitude "in the interest of". This was a case in which an oral speech, per se, was the medium.

- d (b) This Hon'ble Court construed all phrases used in Article 19(2) and held that all the grounds mentioned therein can be brought under the general head "public order" in its most comprehensive sense though ordinarily they are intended to exclude each other. Relevant parts of the judgments are as under:

- e "11. But in India under Article 19(2) this wide concept of 'public order' is split up under different heads. It enables the imposition of reasonable restrictions on the exercise of the right to freedom of speech and expression in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. All the grounds mentioned therein can be brought under the general head 'public order' in its most comprehensive sense. But the juxtaposition of the different grounds indicates that, though sometimes they tend to overlap, they must be ordinarily intended to exclude each other. 'Public order' is therefore something which is demarcated from the others. In that limited sense, particularly in view of the history of the amendment, it can be postulated that 'public order' is synonymous with public peace, safety and tranquillity."<sup>9</sup>
- f
- g

\* \* \*

18. The foregoing discussion yields the following results: (1) 'Public order' is synonymous with public safety and tranquillity:

- h 7 Pp. 85-86, *Compilation of Judgments*, Vol. VI  
8 Pp. 96-105, *Compilation of Judgments*, Vol. VI  
9 P. 102, *Compilation of Judgments*, Vol. VI

Summary of Arguments

VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India (contd.)

it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State; (2) there must be proximate and reasonable nexus between the speech and the public order; (3) Section 3, as it now stands, does not establish in most of the cases comprehended by it, any such nexus; (4) there is a conflict of decision on the question of severability in the context of an offending provision the language whereof is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation; one view is that it cannot be split up if there is possibility of its being applied for purposes not sanctioned by the Constitution and the other view is that such a provision is valid if it is severable in its application to an object which is clearly demarcated from other object or objects falling outside the limits of constitutionally permissible legislation; and (5) the provisions of the section are so inextricably mixed up that it is not possible to apply the doctrine of severability so as to enable us to affirm the validity of a part of it and reject the rest.”<sup>10</sup>

6. The next judgment is *Hamdard Dawakhana [Wakf], Lalkuan v. Union of India* [(1960) 2 SCR 671]<sup>11</sup> which pertained to commercial advertisements and this Hon’ble Court held that the same would not fall under Article 19(1)(a) of the Constitution. This was a case of what is known in US jurisprudence as “commercial speech”.

7. The next judgment is *Sakal Papers (P) Ltd. v. Union of India*, [(1962) 3 SCR 842]<sup>12</sup> which pertained to regulating the prices of newspapers in relation to their pages and size and also to regulate the allocation of space for advertising matters. This Hon’ble Court held that the said restriction offends freedom of speech and expression. This was also a case where this Hon’ble Court was dealing with Article 19(1)(a) vis-à-vis print media, namely, a newspaper.

8. The next case in which this Hon’ble Court considered the scope of Articles 19(1)(a) and 19(2) was by the Constitution Bench in *K.A. Abbas v. Union of India*, [(1970) 2 SCC 780]<sup>13</sup>. In this case, this Hon’ble Court was considering the question of validity of pre-censorship essentially apart from the question of obscenity as well as vagueness as a ground to declare the provision invalid. The medium, in this case, was films.

10 P. 104, *Compilation of Judgments*, Vol. VI

11 P. 188 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

12 P. 189 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

13 Pp. 103-126, *Compilation of Judgments*, Vol. II

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Summary of Arguments

VII. Mr. Tushar Mehta, Additional Solicitor General, for the Union of India (contd.)

- a 9. In *Bennett Coleman & Co. v. Union of India*, [(1972) 2 SCC 788]<sup>14</sup> (Constitution Bench judgment), this Hon'ble Court again considered Article 19(1)(a) in the context of *print media* and the majority opinion took the view that compulsory reduction of any newspaper to 10 pages offends Article 19(1)(a).
- b 10. The next case came up for consideration before this Hon'ble Court in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, [(1985) 1 SCC 641]. This case again related to *print media*, namely, newspaper. This Hon'ble Court explained the freedom of speech and expression in the following terms :

"The freedom of expression has four broad social purposes to serve: (i) it helps an individual to attain self-fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making, and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change."
- c 11. On the question of reasonable restrictions, this Hon'ble Court held as under:

"In deciding the reasonableness of restrictions imposed on any fundamental right the court should take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the disproportion of the imposition and the prevailing conditions including the social values whose needs are sought to be satisfied by means of the restrictions."<sup>15</sup>
- d 12. The next decision is *S. Rangarajan v. P. Jagjivan Ram*, [(1989) 2 SCC 574]<sup>16</sup>. In this judgment, this Hon'ble Court held that the term "freedom of speech" under Article 19(1)(a) means the right to express one's opinion by words of mouth, writing, printing, picture or in any other manner and *through any medium - - newspaper, magazine or movie*. The salient features of the said judgment are as under:
  - e (i) The medium of speech and expression in this case was a film/movie.
  - f (ii) This Hon'ble Court held that there should be a compromise between the interest of freedom of expression and social interests.
  - g (iii) This Hon'ble Court held that the Court's commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the

14 P. 191 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

h 15 P. 192 (placita b to f) of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, [(1995) 2 SCC 161] (separately tendered)

16 Pp. 185-210, *Compilation of Judgments*, Vol. VI

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community interest is endangered. It also held that anticipated danger should not be remote, conjectural or far-fetched. a

(iv) This Hon'ble Court held that it should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. It should be inseparably locked up with the action contemplated like the equivalent of a "spark in a powder keg". b

13. While taking a decision based upon a different medium with reference to freedom of speech and expression through medium of movies this Court held, inter alia, as under:

"Movie motivates thought and action and assures a high degree of attention and retention. In view of the scientific improvements in photography and production, the present movie is a powerful means of communication. It has a unique capacity to disturb and arouse feelings. It has much potential for evil as it has for good. With these qualities and since it caters for mass audience who are generally not selective about what they watch, a movie cannot be equated with other modes of communication. It cannot be allowed to function in a free marketplace just as does the newspaper or magazines. Censorship by prior restraint is, therefore, not only desirable but also necessary."17 c d

14. While considering the standards to be applied by the Film Censor Board, this Hon'ble Court laid down the test as under:

"The standard to be applied by the Board or courts for judging the film should be that of an ordinary man of common sense and prudence and not that of an out-of-the-ordinary or hypersensitive man. The Board should exercise considerable circumspection on movies affecting the morality or decency of our people and cultural heritage of the country. The moral values in particular, should not be allowed to be sacrificed in the guise of social change or cultural assimilation. The path of right conduct shown by the great sages and thinkers of India and the concept of 'Dharma' (righteousness in every respect) which are the bedrock of our civilisation should not be allowed to be shaken by unethical standards."18 e f

15. This Hon'ble Court also analysed a possibility of infringements of Article 19(1)(a) on an anticipation of threat of demonstration, processions or violence and held as under:

"Whether this view is right or wrong is another matter altogether and at any rate, the court is not concerned with its correctness or usefulness to the people. The court is only concerned whether such a view could be g

17 P. 194 (placitum d) of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

18 P. 194 (placitum f) of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered) h

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VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India (*contd.*)

- a advocated in a film. To say that one should not be permitted to advocate that view goes against the first principle of our democracy. If the film is unobjectionable and cannot constitutionally be restricted under Article 19(2), freedom of expression cannot be suppressed on account of threat of demonstration and processions or threats of violence. That would tantamount to negation of the rule of law and a surrender to blackmail and intimidation. It is the duty of the State to protect the freedom of expression since it is a liberty guaranteed against the State. *The State cannot plead its inability to handle the hostile audience problem. Freedom of expression which is legitimate and constitutionally protected cannot be held to ransom by an intolerant group of people. The fundamental freedom under Article 19(1)(a) can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity and not the quicksand of convenience or expediency.* Open criticism of government policies and operations is not a ground for restricting expression.”<sup>19</sup>
- b
- c

- d 16. Next judgment was *Printers (Mysore) Ltd. v. CTO*, [(1994) 2 SCC 434] wherein this Hon’ble Court quoted the opinion of Douglas, J. in *Terminiello v. Chicago*, [337 US 1 (1949)] that “acceptance by Government of a dissident press is a measure of the maturity of the nation”<sup>20</sup>.

17. The next judgment is *LIC v. Manubhai D. Shah*, [(1992) 3 SCC 637]. While upholding the freedom of speech and expression and analysed Article 19(1)(a) in the context of Article 19(2) in the following words:

- e “The words ‘freedom of speech and expression’ must be broadly construed to include the freedom to circulate one’s views by words of mouth or in writing or through audio-visual instrumentalities. It, therefore, includes the right to propagate one’s views through the print media i.e. periodicals, magazines or journals or through any other communication channel e.g. the radio and the television. The right extends to the citizen being permitted to use the media to answer the criticism levelled against the view propagated by him. The print media, the radio and the tiny screen play the role of public educators, so vital to the growth of a healthy democracy. These communication channels are great purveyors of news and views and make considerable impact on the minds of the readers and viewers and are known to mould public opinion on vital issues of national importance. Modern communication mediums advance public interest by informing the public of the events and developments that have taken place and thereby educating the voters, a role considered significant for the vibrant functioning of a democracy. Therefore, in any set-up, more so in a democratic set-up like ours,
- f
- g

h 19 P. 195 (placita f to h) of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

20 P. 196 para 19 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

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dissemination of news and views for popular consumption is a must and any attempt to deny the same must be frowned upon unless it falls within the mischief of Article 19(2). This freedom must, however, be exercised with circumspection and care must be taken not to trench on the rights of other citizens or to jeopardise public interest.”<sup>21</sup>

18. This Hon’ble Court also further strengthened the concept of freedom of speech and expression in the following terms:

“A constitutional provision is never static, it is ever-evolving and ever-changing and, therefore, does not admit of a narrow, pedantic or syllogistic approach. The Constitution-makers employed a broad phraseology while drafting the fundamental rights so that they may be able to cater to the needs of a changing society. Therefore, constitutional provisions must receive a broad interpretation and the scope and ambit of such provisions, in particular the fundamental rights, should not be cut down by too astute or too restricted an approach, unless the context otherwise requires.”

19. At this juncture, it is necessary to quote the observations of the US Supreme Court in *Pacific case*, [438 US 726 (1978)]<sup>22</sup>. In the said judgment, the US Supreme Court was dealing with *broadcasting through television*. The US Supreme Court in the year 1978 construed, television, as a medium and held that television is a uniquely pervasive presence in the lives of most people. More time is spent watching television than reading. The presence of sound and picture in any home makes it an exceptional potent medium. It may also be harder to stop children having access to “adult material” on television than to pornographic magazines.

20. Having considered the freedom of speech and expression in the context of print media, namely, newspapers/magazines and cinema and television, this Hon’ble Court was confronted with another dimension of the medium raised by the broadcasters claiming “right to broadcast” to be a fundamental right under Article 19(1)(a) of the Constitution.

21. In *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161, the law on the freedom of speech and expression was summarised as under:

“43. We may now summarise the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2). The freedom of speech and expression includes the right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find the truest model of

21 Pp. 197-198 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

22 P. 210 (placitum f) of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)



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- a anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. *The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech, etc.* That is why freedom of speech and expression includes freedom of the Press. The freedom of the Press in terms includes the right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach."<sup>23</sup>
- b
- c 22. This Hon'ble Court also considered electronic media as a medium of free speech and expression in the following terms:  
"46. What distinguishes the electronic media like the television from the print media or other media is that it has both audio and visual appeal and has a more pervasive presence. It has a greater impact on the minds of the viewers and is also more readily accessible to all including children at home. Unlike the print media, however, there is a built-in limitation on the use of electronic media because the airwaves are a public property and hence are owned or controlled by the Government or a central national authority or they are not available on account of the scarcity, costs and competition."<sup>24</sup>
- d
- e 23. This judgment is also useful to contend that intermediaries cannot assert any right based upon Article 19(1)(a) (See paras 53-82).
24. In the aforesaid judgment, this Hon'ble Court, inter alia, held as under:  
"122. We, therefore, hold as follows:  
(i) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interests of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an inbuilt restriction on its use as in the case of any other public property.  
(ii) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Article 19(1)(a) of the Constitution. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of
- f
- g

h 23 P. 213 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately tendered)

24 P. 213 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal* (1995) 2 SCC 161 (separately tendered)

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the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Article 19(2) of the Constitution." a

25. It is important to note that for the first time this Hon'ble Court introduced the concept of airwaves or frequency being a "public property" and recognized the right/power of public authorities to control and regulate the same in the interest of public and also to prevent invasion of rights of the public. b

26. In the aforesaid decision, B.P. Jeevan Reddy, J. gave a separate but concurring judgment and, inter alia, held as under:

"150. There may be no difficulty in agreeing that a game of cricket like any other sports event provides entertainment — and entertainment is a facet, a part, of free speech<sup>25</sup>, *subject to the caveat that where speech and conduct are joined in a single course of action, the free speech values must be balanced against competing societal interests.*" c

27. In the said concurring judgment, this Hon'ble Court analysed the concept of "broadcasting freedom" in the following four facets: d

(i) Freedom of the broadcasters;

(ii) Freedom of the listeners/viewers to a variety of view and plurality of opinion;

(iii) Rights of the citizens and group of citizens to have access to the broadcasting media; and e

(iv) Right to establish private radio/TV stations.

28. This Hon'ble Court recognised and accepted reasonable interference in such rights in the interest of the audience by way of safeguards by imposition of programme standards:

"176. Broadcasting freedom involves and includes the right of the viewers and listeners who retain their interest in free speech. It is on this basis that the European courts have taken the view that restraints on freedom of broadcasters are justifiable on the very ground of free speech. It has been held that freedom of expression includes the right to receive information and ideas as well as freedom to impart them: f

"The free speech interests of viewers and listeners in exposure to a wide variety of material can best be safeguarded by the imposition of programme standards, limiting the freedom of radio and television companies. What is important according to this perspective is that the broadcasting institutions are free to discharge their responsibilities of providing the public with a balanced range of programmes and a variety of views. These free speech goals require positive legislative g

25 *Joseph Burstyn v. Wilson*, 96 L Ed 1098 : 343 US 495 (1952) h

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- a provision to prevent the domination of the broadcasting authorities by the Government or by private corporations and advertisers, and perhaps for securing impartiality....'

\* \* \*

- b 178. The third facet of broadcasting freedom is the freedom of individuals and groups of individuals to have access to broadcasting media to express their views. The first argument in support of this theory is that public is entitled to hear range of opinions held by different groups so that it can make sensible choices on political and social issues. *In particular, these views should be exposed on television, the most important contemporary medium. It is indeed the interest of audience that justified the imposition of impartiality rules and positive programme standards upon the broadcasters.* The theoretical foundation for the claim for access to broadcasting is that freedom of speech means the freedom to communicate effectively to a mass audience which means through mass media. This is also the view taken by our Court as pointed out supra."

- d 29. His Lordship also accepted that airwaves are public property in the following terms:

- e "185. It is true that with the advances in technology, the argument of few or limited number of frequencies has become weak. Now, it is claimed that an unlimited number of frequencies are available. We shall assume that it is so. Yet the fact remains that airwaves are public property, and that they are to be utilised to the greatest public good; that they cannot be allowed to be monopolised or hijacked by a few privileged persons or groups; that granting licence to everyone who asks for it would reduce the right to nothing and that such a licensing system would end up in creation of oligopolies as the experience in Italy has shown—where the limited experiment of permitting private broadcasting at the local level though not at the national level, has resulted in creation of giant media empires and media magnates, a development not conducive to free speech right of the citizens."

- f 30. On the question of nature of grounds specified in Article 19(2), His Lordship observed as under:

- g "187. A look at the grounds in clause (2) of Article 19, in the interests of which a law can be made placing reasonable restrictions upon the freedom of speech and expression goes to show that they are all conceived in the national interest as well as in the interest of society. The first set of grounds viz. the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are grounds referable to national interest whereas the second set of grounds viz. decency, morality, contempt of court, defamation and incitement to offence are conceived in the interest of society. The interconnection and

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the interdependence of freedom of speech and the stability of society is undeniable. They indeed contribute to and promote each other. Freedom of speech and expression in a democracy ensures that the change desired by the people, whether in political, economic or social sphere, is brought about peacefully and through law. That change desired by the people can be brought about in an orderly, legal and peaceful manner is by itself an assurance of stability and an insurance against violent upheavals which are the hallmark of societies ruled by dictatorships, which do not permit this freedom. The stability of, say, the British nation and the periodic convulsions witnessed in the dictatorships around the world is ample proof of this truism. The converse is equally true. The more stable the society is, the more scope it provides for exercise of right of free speech and expression. A society which feels secure can and does permit a greater latitude than a society whose stability is in constant peril. As observed by Lord Sumner in *Bowman v. Secular Society Ltd.*<sup>26</sup>:

"The words, as well as the acts, which tend to endanger society differ from time to time in proportion as society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day, meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before.... After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact. I desire to say nothing that would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right may be, but only to say that, experience having proved dangers once thought real to be now negligible, and dangers once very possibly imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion ... which prevents us from varying their application to the particular circumstances of our time in accordance with that experience."

188. It is for this reason that our Founding Fathers while guaranteeing the freedom of speech and expression provided simultaneously that the said right cannot be so exercised as to endanger the interest of the nation or the interest of the society, as the case may be. This is not merely in the interest of nation and society but equally in the interest of the freedom of speech and expression itself, the reason being the mutual relevance and interdependence aforesaid."

31. His Lordship also analysed the importance and significance of television in the modern world (as in 1995) in the following terms:

"192. The importance and significance of television in the modern world needs no emphasis. Most people obtain the bulk of their

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- a information on matters of contemporary interest from the broadcasting medium. The television is unique in the way in which it intrudes into our homes. The combination of picture and voice makes it an irresistibly attractive medium of presentation. Call it the idiot box or by any other pejorative name, it has a tremendous appeal and influence over millions of people. Many of them are glued to it for hours on end each day.
- b Television is shaping the food habits, cultural values, social mores and what not of the society in a manner no other medium has done so far. Younger generation is particularly addicted to it. It is a powerful instrument, which can be used for greater good as also for doing immense harm to the society. It depends upon how it is used. With the advance of technology, the number of channels available has grown enormously. National borders have become meaningless. The reach of
- c some of the major networks is international; they are not confined to one country or one region. It is no longer possible for any government to control or manipulate the news, views and information available to its people. In a manner of speaking, the technological revolution is forcing internationalism upon the world. No nation can remain a fortress or an island in itself any longer. Without a doubt, this technological revolution
- d is presenting new issues, complex in nature — in the words of Burger, C.J. “complex problems with many hard questions and few easy answers”. Broadcasting media by its very nature is different from press. Airwaves are public property. The fact that a large number of frequencies/channels are available does not make them anytheless public
- e property. It is the obligation of the State under our constitutional system to ensure that they are used for public good.”

32. His Lordship also considered the questions of permitting the private broadcasting and held as under:

- f “Allowing private broadcasting would be to open the door for powerful economic, commercial and political interests, which may not prove beneficial to free speech right of the citizens—and certainly so, if strict programme controls and other controls are not prescribed. The analogy with press is wholly inapt. Above all, airwaves constitute public property. While, the freedom guaranteed by Article 19(1)(a) does include the right to receive and impart information, no one can claim the fundamental right to do so by using or employing public property. Only
- g where the statute permits him to use the public property, then only—and subject to such conditions and restrictions as the law may impose—he can use the public property viz. airwaves. In other words, Article 19(1)(a) does not enable a citizen to impart his information, views and opinions by using the airwaves. He can do so without using the airwaves. It need
- h not be emphasised that while broadcasting cannot be effected without using airwaves, receiving the broadcast does not involve any such use. Airwaves, being public property must be utilised to advance public good.

Public good lies in ensuring plurality of opinions, views and ideas and that would scarcely be served by private broadcasters, who would be and who are bound to be actuated by profit motive. There is a far greater likelihood of these private broadcasters indulging in misinformation, disinformation and manipulation of news and views than the government-controlled media, which is at least subject to public and parliamentary scrutiny. The experience in Italy, where the Constitutional Court allowed private broadcasting at the local level while denying it at the national level should serve as a lesson; this limited opening has given rise to giant media oligopolies as mentioned supra. Even with the best of programme controls it may prove counterproductive at the present juncture of our development; the implementation machinery in our country leaves much to be desired which is shown by the ineffectiveness of the several enactments made with the best of the intentions and with most laudable provisions; this is a reality which cannot be ignored. It is true that even if private broadcasting is not allowed from Indian soil, such stations may spring up on the periphery of or outside our territory, catering exclusively to the Indian public. Indeed, some like stations have already come into existence. The space, it is said, is saturated with communication satellites and that they are providing and are able to provide any number of channels and frequencies. *More technological developments must be in the offing. But that cannot be a ground for enlarging the scope of Article 19(1)(a). It may be a factor in favour of allowing private broadcasting—or it may not be.* It may also be that Parliament decides to increase the number of channels under Doordarshan, diversifying them into various fields, commercial, educational, sports and so on. Or Parliament may decide to permit private broadcasting, but if it does so permit, it should not only keep in mind the experience of the countries where such a course has been permitted but also the conditions in this country and the compulsions of technological developments and the realities of situations resulting from technological developments. We have no doubt in our mind that it will so bear in mind the above factors and all other relevant circumstances. *We make it clear, we are not concerned with matters of policy but with the content of Article 19(1)(a) and we say that while public broadcasting is implicit in it, private broadcasting is not.* Matters of policy are for Parliament to consider and not for courts. On account of historical factors, radio and television have remained in the hands of the State exclusively. Both the networks have been built up over the years with public funds. They represent the wealth and property of the nation. It may even be said that they represent the material resources of the community within the meaning of Article 39(b). They may also be said to be 'facilities' within the meaning of Article 38. They must be employed consistent with the above articles and consistent with the constitutional policy as adumbrated

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a in the Preamble to the Constitution and Parts III and IV. We must reiterate that the press whose freedom is implicit in Article 19(1)(a) stands on a different footing. The petitioners—or the potential applicants for private broadcasting licences—cannot invoke the analogy of the press. *To repeat, airwaves are public property and better remain in public hands in the interest of the very freedom of speech and expression of the citizens of this country.*<sup>27</sup>

b 33. In case of internet, apart from large-scale technological advancement during the period between television and internet, the question of use of airwaves/spectrum, which is a public property, is involved whenever an internet user uses internet through a medium of cell phones, I-pads and in case where V-Sat connection is used. It may be mentioned that “ATM machines” is a “computer network” as defined under Section 2(j) of the Act.

c The entire network of ATMs is connected through V-Sat network using airwaves. Whenever, wifi connections are available, the net connectivity is provided through airwaves only.

34. In view of the above discussion and the analysis of Section 66-A, the submissions are as under:

d 34.1. The internet as a medium of free speech and expression is totally different from print media, television and cinemas and, therefore, the threshold of permissive regulation under Article 19(2) shall have to be different.

e 34.2. The caution cited by this Hon’ble Court in *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal* in allowing private broadcasting has now become a reality as each person using internet has now become a “private broadcaster” and does not need any regulated airwaves or a broadcasting licence from any statutory authority after qualifying for the same based upon eligibility criteria. Neither, he nor she is required to follow any regulatory regime of conduct or under any obligation to follow any rules of ethical conduct which are applicable on other modes like press and cinematograph.

f Further, considering the fact that one person (while maintaining his own anonymity) can spread whatever he uploads in the borderless virtual world which can be accessed by trillions of people in a nano second and throughout the globe, regulations are needed in the interest of sovereignty and integrity of India, in the interest of security of State, in the interest of friendly relations with foreign States, in the interest of public order, in the interest of decency or morality or in relation to defamation or incitement to an offence.

g 34.3. The relevant threshold of reasonableness of restriction would differ from other mediums to the medium of internet on the following grounds:

(i) The reach of print media is restricted to one State or at the most one country while internet has no boundaries and its reach is global;

h 27 P. 293 of *Ministry of I&B, Govt. of India v. Cricket Assn. of Bengal*, (1995) 2 SCC 161 (separately rendered)

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(ii) the recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video; a

(iii) In case of television serials (except live shows) and movies, there is a permitted pre-censorship which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation; b

(iv) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted/televised/viewed. While in case of an internet, morphing of images, change of voices and many other technologically advanced methods to create serious potential social disorder can be applied. c

(v) By the medium of internet, rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums. d

(vi) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India. e

(vii) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender. f

(viii) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy/borrow a newspaper and/or will have to go to a theatre to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed to and that too only at a time when it is being telecast. While in case of internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases. g

(ix) In case of other mediums, it is impossible to maintain anonymity as a result of which speech/idea/opinions/films having serious potential of creating a social disorder never gets generated since its origin is bound h



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- a to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

- b (x) In case of other mediums like newspapers, television or films, the approach is always institutionalised approach governed by industry specific ethical norms of self conduct. Each newspaper/magazine/movie production house/TV channel will have its own institutionalised policies in-house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19(1)(a).

- c (xi) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constraints. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said  
d infrastructural and logistical constraints have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click.

- e 35. From the above, it is clear that any statute concerning freedom of speech and expression and the reasonableness of the restrictions imposed under it will have to be considered based upon the medium which is being used for exercising the said freedom. From the above evolution of law on the said point, it becomes clear that more the reach of the medium, more restrictions are found to be not only constitutionally permitted but to have  
f been mandated to protect the freedom of speech and expression itself. In the present context, there can be no faster medium having global reach than the internet, posing a serious threat of serious public order problems or social disintegration in a nano second by a mere click of a button. The freedom of speech and expression can never encompass within its sweep the freedom to convey "information" which are either "grossly offensive" or of "menacing  
g character" as contemplated under Section 66-A(a) of the Act or any "information" sent for the purpose of causing "danger", "obstruction", "insult", "injury", "criminal intimidation", "enmity", "hatred" or "ill will" as contemplated under Section 66(b) of the Act.

- h 36. The threshold of reasonable restrictions differs based upon the medium. Apart from the above-referred Indian judgments which incidentally deal with the question of medium vis-à-vis reasonableness of restriction on fundamental rights, the following judgments of the US Supreme Court deals

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with the question specifically in the context of the First and Fourteenth Amendments. In *Metromedia, Inc. v. City of San Diego*, [453 US 490 (1981)] the US Supreme Court held as under: a

"The uniqueness of each medium of expression has been a frequent refrain: see e.g. *South-eastern Promotions, Ltd. v. Conrad*, 420 US 546, 420 US 557 (1975) ('Each medium of expression ... must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.');

*FCC v. Pacifica Foundation*, 438 US 726, 438 US 748 (1978) ('We have long recognized that each medium of expression presents special First Amendment problems.');

*Joseph Burstyn, Inc. v. Wilson*, 343 US 495, 343 US 503 (1952) ('Each method tends to present its own peculiar problems.')

b

A similar view was taken as far as in the year 1949 by the US Supreme Court in *Kovacs v. Cooper*, [336 US 77 (1949)]. c

37. As already submitted the terms "annoyance" and "inconvenience" as used in Section 66-A(b) refer to "annoyance" and "inconvenience" as understood in the parlance of internet usage and accepted internet jargon. Causing "annoyance" and/or "inconvenience" as understood linguistically by sending "information", while exercising freedom of speech and expression is not a punishable offence under Section 66-A(b) of the Act. It becomes a penal act only when any "information" is sent which causes "annoyance" and/or "inconvenience" by any other mode other than exercising freedom of speech and expression. d

38. So far as Section 66-A(c) is concerned, it is elaborately dealt with in the submissions earlier tendered and, therefore, not reiterated here. e

**Conclusion**

39. While deciding the constitutional validity of Section 66-A, this Hon'ble Court may give an appropriate threshold of reasonableness based upon:

- (a) The nature of the right alleged to have been infringed; f
- (b) The underlying purpose of the restrictions imposed;
- (c) The extent and urgency of the evil sought to be remedied;
- (d) The prevailing conditions at the time when the section came to be introduced.
- (e) Right of the recipient and others who may be affected by use of internet under Article 21 of the Constitution of India. g

**II. On the question of vagueness to be a ground for declaring a provision unconstitutional**

40. It is a settled law that no provision in a statute may be declared unconstitutional on an allegation that same is vague if there are no other grounds like legislative competence, arbitrariness, etc. h

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a 41. In the context of new emerging areas of technology and in the context of Article 10(1) and Article 10(2) of the European Convention of Human Rights [which is akin to Articles 19(1)(a) and 19(2) of the Indian Constitution] the European Court of Human Rights in *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, Section 41, ECHR 2007-IV<sup>28</sup>, held that whilst certainty in a statute is desirable, however  
b it may bring with its excessive rigidity, and on the other hand the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice. The relevant text of the said judgment reads as under:

c "41. The Court reiterates that a norm cannot be regarded as a 'law' within the meaning of Articles 10 and 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able — if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train  
d excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.

e The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in  
f relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails."

g 42. Furthermore in England there is a concept of certain words as "Elephant words" i.e. there are certain things which you know only when you see it but you cannot describe it in words. In *Aerotel Ltd. v. Telco Holdings Ltd.*, (2007) 1 All ER 225,<sup>29</sup> the Court observed as under:

"24. It is clear that a whole range of approaches have been adopted over the years both by EPO and national courts. Often they lead or would lead to the same result, but the reasoning varies. One is tempted to say

h 28 Judgment in the compilation with heading "Additional Judgments Referred in Note on the Question of Vagueness to be a Ground for Declaring a Provision Unconstitutional".

29 Judgment in the compilation with heading "Additional Judgments Referred in Note on the Question of Vagueness to be a Ground for Declaring a Provision Unconstitutional".

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that an Article 52(2) exclusion is like an elephant, you know it when you see it, but you cannot describe it in words. Actually we do not think that is right—there are likely to be real differences depending on what the right approach is. Billions [euros, pounds or dollars] turn on it.” a

43. Similar view is taken in *Frances Muriel Street v. Derbyshire Unemployed Workers' Centre*, [(2004) 4 All ER 839]<sup>30</sup> where the Court observed as under:

“54. When I first drafted this judgment I was of the view that, in the case of the requirement of ‘in good faith’ (I say nothing in this respect about motivation of personal gain because it is not an issue in the appeal), such an assessment should not, in my view, be cluttered with notions of predominance or degrees of predominance, as suggested by public concern and adopted by Mr Donovan as a “fall-back” submission. In each case the answer one way or the other might be a ‘judicial elephant’ emerging from the Tribunal’s consideration of all the evidence. I considered that it could be unhelpful, often unreal when the countervailing considerations are of quite a different nature, and unduly prescriptive to introduce into the exercise an explicit formula of the sort suggested by public concern that an ulterior motive should only negative good faith when it is so wicked and/or malicious as to be or to approach dishonesty and is the predominant motive for the disclosure.” b

44. It is submitted that there are certain expressions which have:

- (a) an inbuilt impossibility of being precisely defined;
- (b) the legislative intent is to keep them undefined considering the ever changing technology and the laudable object which it seeks to achieve. c

45. A similar view is taken by the Privy Council in *Salmon v. Duncombe*, [(1886) LR 11 AC 627]<sup>31</sup> as under:

“Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman’s unskillfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.” d

46. In India, the said question arose in *Municipal Committee, Amritsar v. State of Punjab*, [(1969) 1 SCC 475]<sup>32</sup>, where this Hon’ble Court held as under:

“3. Validity of the Punjab Cattle Fairs (Regulation) Act, 1968, was challenged in a group of petitions moved before the High Court of Punjab by persons interested in holding cattle fairs; *Mohinder Singh* e

30 Judgment in the compilation with heading “Additional Judgments Referred in Note on the Question of Vagueness to be a Ground for Declaring a Provision Unconstitutional”.

31 Pp. 1-12 at pp. 1 & 8 of *Compilation of Judgments*, Vol. II f

32 Pp. 13-23 at pp. 16-17 of *Compilation of Judgments*, Vol. II g

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a *Sawhney v. State of Punjab*<sup>33</sup>. Before the High Court one of the contentions raised by the petitioners was that the provisions of the Act were 'vague and ambiguous', and on that account the Act was *ultra vires*. The Court accepted that contention. The Court observed that there was a distinction between a 'cattle market' and a 'cattle fair' and since no definition of 'cattle fair' was supplied by the Act, it was left to the executive authorities to determine what a 'cattle fair' was, and on that account 'the infirmity went to the root of the matter, and the Act was liable to be struck down in its entirety on the ground of vagueness, even if some of its provisions were unexceptionable in themselves.'

c 4. The State Legislature then enacted the Punjab Cattle Fairs (Regulation) Amendment Act 18 of 1968 which introduced by Section 2(bb) a definition of the expression 'cattle fair' as meaning 'a gathering of more than twenty-five persons for the purpose of general sale or purchase of cattle'. Fair Officers were appointed by the State Government and they issued notifications declaring certain areas as 'fair areas'.

d 5. A number of petitions were again moved in the High Court of Punjab for an order declaring invalid the Act as amended. The High Court of Punjab dismissed the petitions, upholding the validity of the Act; *Kehar Singh v. State of Punjab*<sup>34</sup>. The Court in that case held that the definition of 'cattle fair' was not intended to bring within its compass sales by private individuals outside fair areas; it was intended only to apply where in general, people assemble at some place for the purpose of buying and selling cattle and the number of persons exceeds twenty-five, and that Act 6 of 1968, as amended by Act 18 of 1968, 'does not contravene the provisions of Articles 19(1)(f) and (g) of the Constitution'.

e 6. Certain persons interested in conducting cattle fairs have filed writ petitions in this Court. Arguments which are common in all the petitions may first be considered.

f 7. We are unable to accept the argument that since the High Court of Punjab by their judgment in *Mohinder Singh Sawhney case* struck down the Act, Act 6 of 1968 had ceased to have any existence in law, and that in any event, assuming that, the judgment of the Punjab High Court in *Mohinder Singh Sawhney case* did not make the Act non-existent, as between the parties in whose favour the order was passed in the earlier writ petition, the order operated as *res judicata*, and on that account the Act could not be enforced without re-enactment. The High Court of Punjab in *Mohinder Singh Sawhney case* observed at p. 396:

g '... in our opinion the petitions must succeed on the ground that the legislation is vague, uncertain and ambiguous', and also (at p. 394) that—

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33 AIR 1968 Punj 391  
34 (1969) 71 PLR 24

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'... as the infirmity of vagueness goes to the root of the matter, legislative enactment has to be struck down as a whole even if some of its provisions are unexceptionable in themselves.' a

But the rule that an Act of a competent legislature may be 'struck down' by the courts on the ground of vagueness is alien to our constitutional system. The legislature of the State of Punjab was competent to enact legislation in respect of 'fairs', vide Entry 28 of List II of the Seventh Schedule to the Constitution. A law may be declared invalid by the superior courts in India if the legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provision, but not on the ground that it is vague. It is true that in *Connally v. General Construction Co.*<sup>35</sup>, it was held by the Supreme Court of the United States of America that: b

'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' c

But the rule enunciated by the American courts has no application under our constitutional set-up. The rule is regarded as an essential of the 'due process clauses' incorporated in the American Constitution by the 5th and the 14th Amendments. The courts in India have no authority to declare a statute invalid on the ground that it violates the 'due process of law'. Under our Constitution, the test of due process of law cannot be applied to statutes enacted by Parliament or the State Legislatures. This Court has definitely ruled that the doctrine of due process of law has no place in our constitutional system. *A.K. Gopalan v. State of Madras*<sup>36</sup>. Kania, C.J., observed (SCR at p. 120): d

'There is considerable authority for the statement that the courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in words ... it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment.' e

The order made by the High Court in *Mohinder Singh Sawhney case*, striking down the Act was passed on the assumption that the validity of the Act was liable to be adjudged by the test of 'due process of law'. The Court was plainly in error in so assuming. We are also unable to hold that the previous decision operates as *res judicata* even in favour of the petitioners in whose petitions an order was made by the High Court in f

<sup>35</sup> 70 L Ed 322 : 269 US 385 (1926)

<sup>36</sup> AIR 1950 SC 27 : 1950 SCR 88 g

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a the first group of petitions. The effect of that decision was only that the Act was in law, non-existent, so long as there was no definition of the expression 'cattle fair' in the Act. That defect has been remedied by Punjab Act 18 of 1968.

b 8. We may hasten to observe that we are unable to agree that the Act as originally enacted was unenforceable even on the ground of vagueness. It is true that the expression 'cattle fair' was not defined in the Act. The legislature when it did not furnish the definition of the expression 'cattle fair' must be deemed to have used the expression in its ordinary signification, as meaning a periodical concourse of buyers and sellers in a place generally for sale and purchase of cattle at times or on occasions ordained by custom."

c 47. The said judgment came to be considered in *K.A. Abbas v. Union of India*, [(1970) 2 SCC 780]<sup>37</sup>. The Constitution Bench analysed the concept of vagueness to be a ground of declaring a provision to be unconstitutional in the following terms:

d 40. It would appear from this that censorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise of power in the interests of public morality, decency, etc. This is not to be construed as necessarily offending the freedom of speech and expression. This has, however, happened in the United States and therefore decisions, as Justice Douglas said in his *Tagore Law Lectures* (1939), have the flavour of due process rather than what was conceived as the purpose of the First Amendment. This is because social interest of the people override individual freedom. Whether we regard the state as the *parens patriae* or as guardian and promoter of general welfare, we have to concede, that these restraints on liberty may be justified by their absolute necessity and clear purpose. Social interests take in not only the interests of the community but also individual interests which cannot be ignored. A balance has therefore to be struck between the rival claims by reconciling them. The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency and things which affect the security of the State and the preservation of public order and tranquillity. As Ahrens said the question calls for a good philosophical compass and strict logical methods.

g 41. With this preliminary discussion we say that censorship in India (and pre-censorship is not different in quality) has full justification in the field of the exhibition of cinema films. We need not generalise about other forms of speech and expression here for each such fundamental right has a different content and importance. The censorship imposed on the making and exhibition of films is in the interests of society. If the

37 Pp. 103-206 at pp. 121-23 of *Compilation of Judgments*, Vol. II

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regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused. We hold, therefore, that censorship of films including prior restraint is justified under our Constitution. a

42. This brings us to the next questions: how far can these restrictions go? and how are they to be imposed? This leads to an examination of the provisions contained in Section 5-B(2). That provision authorises the Central Government to issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition. b

43. The first question raised before us is that the legislature has not indicated any guidance to the Central Government. We do not think that this is a fair reading of the section as a whole. The first sub-section states the principles and read with the second clause of the nineteenth article it is quite clearly indicated that the copies of films or their content should not offend certain matters there set down. The Central Government in dealing with the problem of censorship will have to bear in mind those principles and they will be the philosophical compass and the logical methods of Ahrens. Of course, Parliament can adopt the directions and put them in schedule to the Act (and that may still be done), it cannot be said that there is any delegation of legislative function. If Parliament made a law giving power to close certain roads for certain vehicular traffic at stated times to be determined by the executive authorities and they made regulations in the exercise of that power, it cannot for a moment be argued that this is insufficient to take away the right of locomotion. Of course, everything may be done by legislation but it is not necessary to do so if the policy underlying regulations is clearly indicated. The Central Government's regulations are there for consideration in the light of the guaranteed freedom and if they offend substantially against that freedom, they may be struck down. But as they stand they cannot be challenged on the ground that any recondite theory of law-making or a critical approach to the separation of powers is infringed. We are accordingly of the opinion that Section 5-B(2) cannot be challenged on this ground. c d e f

48. This brings us to the manner of the exercise of control and restriction by the directions. *Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable.* Reliance in this connection is placed on *Municipal Committee, Amritsar v. State of Punjab*<sup>38</sup>. In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid g

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a on the ground that it violates the due process clause or that it is vague. Shah, J., speaking for the Division Bench, observes:

'... the rule that an Act of a competent legislature maybe "struck down" by the courts on the ground of vagueness is alien to our constitutional system. The legislature of the State of Punjab was competent to enact legislation in respect of "fairs", vide Entry 28 of List II of the VIIIth Schedule to the Constitution. A law may be declared invalid by the superior courts in India if the legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provision, but not on the ground that it is vague.'

c The learned Judge refers to the practice of the Supreme Court of the United States in *Connally v. General Construction Co.*<sup>39</sup> where it was observed:

'A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

d The learned Judge observes in relation to this as follows:

'But the rule enunciated by the American courts has no application under our constitutional set-up. This rule is regarded as an essential of the "due process clause" incorporated in the American Constitution by the 5th and 14th Amendments. The courts in India have no authority to declare a statute invalid on the ground that it violates "the due process of law". Under our Constitution, the test of due process of law cannot be applied to the statutes enacted by Parliament or the State Legislature.'

f Relying on the observations of Kania, C.J., in *A.K. Gopalan v. State of Madras*<sup>40</sup> to the effect that a law cannot be declared void because it is opposed to the spirit supposed to pervade the Constitution but not expressed in words, the conclusion above set out is reiterated. The learned Judge, however, adds that the words 'cattle fair' in act there considered, are sufficiently clear and there is no vagueness.

g 45. These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so

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39 70 L Ed 322 : 269 US 385 (1926)  
40 AIR 1950 SC 27 : 1950 SCR 88

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considered. A very pertinent example is to be found in *State of M.P. v. Baldeo Prasad*<sup>41</sup> where the Central Provinces and Berar Goondas Act, 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4-A was that the person sought to be proceeded against must be a Goonda but the definition of Goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague. a

46. The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus, if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases. b c d

49. The question then came up for consideration before the Constitution Bench by this Hon'ble Court in *A.K. Roy v. Union of India*, [(1982) 1 SCC 271]<sup>42</sup>.

"61. In making these submissions counsel seem to us to have overstated their case by adopting an unrealistic attitude. It is true that the vagueness and the consequent uncertainty of a law of preventive detention bears upon the unreasonableness of that law as much as the uncertainty of a punitive law like the Penal Code does. A person cannot be deprived of his liberty by a law which is nebulous and uncertain in its definition and application. But in considering the question whether the expressions aforesaid which are used in Section 3 of the Act are of that character; we must have regard to the consideration whether the concepts embodied in those expressions are at all capable of a precise definition. The fact that some definition or the other can be formulated of an expression does not mean that the definition can necessarily give certainty to that expression. The British Parliament has defined the term 'terrorism' in Section 28 of the Act of 1973 to mean 'the use of violence for political ends', which, by definition, includes 'any use of violence for the purpose of putting the public or any section of the public in fear'. The phrase 'political ends' is itself of an uncertain character and comprehends within its scope a variety of nebulous situations. Similarly, the definitions e f g

41 AIR 1961 SC 293

42 Pp. 24-102 at pp. 70-73 of *Compilation of Judgments*, Vol. II h

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- a contained in Section 8(3) of the Jammu and Kashmir Act, 1978 themselves depend upon the meaning of concepts like 'overawe the Government'. The formulation of definitions cannot be a panacea to the evil of vagueness and uncertainty. We do not, of course, suggest that the legislature should not attempt to define or at least to indicate the contours of expressions, by the use of which people are sought to be deprived of their liberty. The impossibility of framing a definition with mathematical precision cannot either justify the use of vague expressions or the total failure to frame any definition at all which can furnish, by its inclusiveness at least, a safe guideline for understanding the meaning of the expressions used by the legislature. *But the point to note is that there are expressions which inherently comprehend such an infinite variety of situations that definitions, instead of leading to them a definite meaning,*
- b *can only succeed either in robbing them of their intended amplitude or in making it necessary to frame further definitions of the terms defined. Acts prejudicial to the 'defence of India', 'security of India', 'security of the State', and 'relations of India with foreign powers' are concepts of that nature which are difficult to encase within the straitjacket of a definition. If it is permissible to the legislature to enact laws of preventive detention,*
- c *a certain amount of minimal latitude has to be conceded to it in order to make those laws effective. That we consider to be a realistic approach to the situation. An administrator acting bona fide, or a court faced with the question as to whether certain acts fall within the mischief of the aforesaid expressions used in Section 3, will be able to find an acceptable answer either way. In other words, though an expression may appear in cold print to be vague and uncertain, it may not be difficult to apply it to life's practical realities. This process undoubtedly involves the possibility of error but then, there is hardly any area of adjudicative process which does not involve that possibility.*
- d 62. The requirement that crimes must be defined with appropriate definiteness is regarded as a fundamental concept in criminal law and must now be regarded as a pervading theme of our Constitution since the decision in *Maneka Gandhi*<sup>43</sup>. The underlying principle is that every person is entitled to be informed as to what the State commands or forbids and that the life and liberty of a person cannot be put in peril on an ambiguity. However, even in the domain of criminal law, the processes of which can result in the taking away of life itself, no more than a reasonable degree of certainty has to be accepted as a fact. Neither the criminal law nor the Constitution requires the application of impossible standards and therefore, what is expected is that the language of the law must contain an adequate warning of the conduct which may fall within the proscribed area, when measured by common understanding. In criminal law, the legislature frequently uses vague expressions like 'bring into hatred or contempt', or 'maintenance of harmony between different
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<sup>43</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

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religious groups', or 'likely to cause disharmony or ... hatred or ill will', or 'annoyance to the public' (see Sections 124-A, 153-A(1)(b), 153-B(1)(c) and 268 of the Penal Code). These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language. a

63. We see that the concepts aforesaid, namely, 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers', which are mentioned in Section 3 of the Act, are not of any great certainty or definiteness. But in the very nature of things they are difficult to define. We cannot therefore strike down these provisions of Section 3 of the Act on the ground of their vagueness and uncertainty. We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to give to those concepts a narrower construction than what the literal words suggest. While construing laws of preventive detention like the National Security Act, care must be taken to restrict their application to as few situations as possible. Indeed, that can well be the unstated premise for upholding the constitutionality of clauses like those in Section 3, which are fraught with grave consequences to personal liberty, if construed liberally." b

50. There appears to be no deviation from the said view so far. c

51. Furthermore, expressions used in Section 66-A are not the expressions which are alien to Indian system of law and are found in various penal provisions under the Indian Penal Code as well as the Criminal Procedure Code. The details of such provisions in a tabular form are reproduced hereunder: d

	Word	IPC	CrPC
1.	Annoyance	182, 188, 209, 268, 294, 350, 441, 510	144
2.	Inconvenience		284, 299, 384
3.	Danger	102, 105, 188, 268, 283, 284, 285, 286, 287, 288, 289, 364, 367, 498-A	133, 137, 142, 144, 338
4.	Obstruction	188, 224, 225, 225-B, 268, 283, 339	133
5.	Insult	228, 295, 295-A, 297, 441, 504, 509	260, 348
6.	Injury	44, 90, 166, 167, 182, 188, 189, 190, 211, 218, 268, 279, 280, 283	37, 125, 130, 133, 142, 144, 152, 174, 220 (Explanation) 330, 335, 338, 339, 357
7.	Criminal intimidation	366, 503, 506.	106, 108, 211 (Explanation) 260, 456
8.	Enmity, hatred or ill will	124-A, 153-A, 153-B, 505(2)	

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- a 52. It may be true that wherever penal provisions in IPC or CrPC use the above-referred expressions there are certain qualifications used by the legislature. However, there are some provisions where the expressions are used without any qualifications. In the said provisions the offence is causing obstruction, annoyance or injury, etc. it is only the different medium or mode through which it is caused is provided in different sections. The said sections are as under:

	Word	IPC
1.	Annoyance	182, 188, 209, 268, 294, 350, 441, 510
2.	Danger	283, 285, 286, 287
3.	Obstruction	188
c 4.	Insult	441, 504
5.	Injury	44, 90, 166, 167, 182, 188, 189, 190, 211, 218, 268, 279, 280, 283
6.	Criminal intimidation	503
7.	Enmity, hatred or ill will	124-A

- d 53. Further this Hon'ble Court has considered certain expressions and has accepted that they are incapable of any precise definition. A list of the said expressions is provided hereinbelow for convenience of this Hon'ble Court:

Sl. No.	Judgment	Word
e 1.	(2006) 4 SCC 558 at paras 56-58 <i>Naveen Kohli v. Neelu Kohli</i>	"Cruelty" appearing in the Hindu Marriage Act, 1955 — Section 13(1)(i-a)
2.	(2005) 8 SCC 351 at para 15 <i>M.M. Malhotra v. Union of India</i>	"Misconduct"
f 3.	(2012) 4 SCC 407 at paras 8-15 <i>Ravi Yashwant Bhoir v. Collector</i>	"Misconduct" "Disgraceful Conduct"
4.	(2012) 5 SCC 342 at paras 15, 22, 23 <i>Marcel Martins v. M. Printer</i>	"Fiduciary capacity" which was not defined in Section 4, Benami Transactions (Prohibition) Act, 1988
g 5.	(2004) 4 SCC 622 <i>Madum Singh v. State of Bihar</i>	"Terrorism" which was not defined under TADA
6.	(2008) 16 SCC 109 at para 5 <i>Hari Singh Gond v. State of M.P.</i>	"Insanity"
h 7.	(2014) 3 SCC 210 at para 14 <i>Sanjay Verma v. Haryana Roadways</i>	"Exceptional and extraordinary circumstances"

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8.	(2012) 9 SCC 460 at para 16 <i>Anil Kapoor v. Ramesh Chander</i>	"Inherent jurisdiction", "to prevent abuse of process" and "to secure the ends of justice" appearing in IPC/CrPC	a
9.	(2010) 5 SCC 246 at paras 23-26 <i>Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra</i>	"Insurgency"	
10.	(2011) 11 SCC 347 at para 15 <i>Ram Singh v. Central Bureau of Narcotics</i>	"Possession" used in Section 8 r/w Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985	b
11.	(2005) 6 SCC 1 at para 11 <i>Jacob Mathew v. State of Punjab</i>	"Negligence"	c
12.	(2003) 5 SCC 315 at para 9 <i>Rajni Kumar v. Suresh Kumar Malhotra</i>	"Special circumstances"	
13.	(2004) 3 SCC 297 at paras 21-25 <i>National Insurance Co. Ltd. v. Swaran Singh</i>	"Accident"	
14.	(1962) 3 SCR 49 <i>Corpn. of Calcutta v. Padma Debi</i>	"Reasonably"	d
15.	(2003) 7 SCC 389, para 8 <i>State of M.P. v. Kedia Leather &amp; Liquor Ltd.</i>	"Nuisance"	
16.	(2004) 12 SCC 770 at para 89 <i>Commr. of Police v. Acharya Jagadishwarananda Avadhuta</i>	"Religion"	e
17.	(2003) 9 SCC 193 <i>State v. Kulwant Singh</i>	"Department"	
18.	1989 Supp (2) SCC 52 <i>Jiyajeemo Cotton Mills Ltd. v. M.P. Electricity Board</i>	"Regulate"	f
19.	(1994) 3 SCC 1 at 28 <i>S.R. Bommai v. Union of India</i>	"Secular"	
20.	1992 Supp (3) SCC 217 at paras 793-795 <i>Indra Sawhney v. Union of India</i>	"Caste"	
21.	1995 Supp (4) SCC 469 at 18 <i>State of Karnataka v. Appa Balu Ingale</i>	"Untouchability"	g
22.	(1974) 1 SCC 683 at para 11 <i>Municipal Council, Tirupathi v. Tirumalai Tirupathi Devasthanam</i>	"Choultries"	
23.	(1964) 1 SCR 809 <i>K.M. Shanmugam v. S.R.V.S. (P) Ltd.</i>	"Error of law and error of fact" and "Error of law apparent on the face of the record"	h

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a	24.	(1962) 2 SCR 24 <i>Abhayonand Mishra v. State of Bihar</i>	"Attempt to commit an offence"
	25.	(1951) 2 SCR 1125 <i>Angurbala Mullick v. Debabrata Mullick</i>	"Shebait"
	26.	(1982) 3 SCC 235 <i>People's Union for Democratic Rights v. Union of India</i>	"Beggar"
b	27.	Further, in a catena of judgments this Hon'ble Court has held that words "public interest", "public purpose", "natural justice", "employer and employee" principle of "just and equitable" clause are incapable of <i>precise definition</i> .	

54. Furthermore, in a catena of judgment this Hon'ble Court held that expression "public interest", like "public purpose", is not capable of any *precise definition*.

55. Similarly, this Hon'ble Court has again held in a series of judgments that the phrase "natural justice" is also not capable of a *precise definition*.

56. Likewise, this Hon'ble Court has also held that words "employer and employee" must necessarily vary from business to business and is by its very nature incapable of *precise definition*. ...

57. Also this Hon'ble Court has held that the principle of "just and equitable" clause baffles a *precise definition*. It must rest with the judicial discretion of the court depending upon the facts and circumstances of each case.

III. On Application of Millers Obscenity Test and Strict Scrutiny Test to test the vires of Section 66-A of the IT Act

58. It is respectfully submitted that while contending that the words "grossly offensive" appearing in Section 66-A are vague, sufficient reliance was placed by the petitioner in WP (C) No. 23 of 2013, on the judgments rendered by the US courts in the following cases:

(i) *Reno, Attorney general of United States v. AUCL*, 521 US 844 (1997)<sup>44</sup>;

(ii) *Ashcroft v. American Civil Liberties Union*, 542 US 656<sup>45</sup>; and

(iii) *ACLU v. Mukasey*, 534 F 3d 181<sup>46</sup>

59. It is submitted that the said judgments were referred because a similarly worded phrase "patently offensive" used in Section 223(d) of the Communication Decency Act (CDA) and Section 231(a)(1) of the Child Online Protection Act (COPA) was held to be vague and overly broad. Accordingly, it was sought to be argued that by applying the test referred to in the said judgments i.e. "relevant community standard test", the words

<sup>44</sup> Pp. 114-168 Vol. IV of Compilation

<sup>45</sup> Pp. 169-204 Vol. IV of Compilation

<sup>46</sup> Pp. 205-230 Vol. IV of Compilation

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"grossly offensive" appearing in Section 66-A would also have to be held as a  
vague and overly broad and hence liable to be struck down.

60. It is respectfully submitted that reliance on the said judgments to test the validity of the Section 66-A is completely misplaced.

61. It is submitted that Section 223(d) of CDA and Section 231(a)(1) of the COPA (as impugned in the said cases) were enacted to protect the minors from gaining access to pornographic material available on cyberspace. Thus b  
in pith and substance the said sections covered only a limited field of "obscenity" and accordingly the relevant "community standard test" i.e. "Millers Test"<sup>47</sup> which governs that limited field in US was applied.

62. However, as opposed to the context of the said judgments, Section 66-A not only places restriction on mere obscene material but also places a c  
restriction on other "information" in the interests of the sovereignty and integrity of India, in the interest of the security of the State, in the interest of the friendly relations with foreign States, in the interest of the public order and in relation to defamation and incitement to an offence.

63. Thus, in view thereof, it is respectfully submitted that the vagueness challenge to Section 66-A cannot be determined solely on the basis of Millers d  
Obscenity Test (as applicable in US) which has a limited or no application in India. Accordingly, for this reason alone, the said judgments are not relevant to adjudicate the controversy raised in the present batch of petitions.

64. Without prejudice to the above, it is submitted that even following the American standards, restriction on freedom of speech and expression can be e  
placed inter alia on the following grounds and in the following manner:

- (i) Fighting words and true threats
- (ii) Content-based restrictions
- (iii) Prior restraint
- (iv) Forum doctrine
- (v) Time, place, and manner restrictions f

65. Thus, if the validity of Section 66-A, in its entirety, has to be tested by applying American standards then all the aforesaid tests are required to be applied and not the limited tests applied in above judgments.

66. Even otherwise, the American standards of obscenity, as applied in the above judgments dealing with Section 223(d) of CDA and Section 231(a)(1) of COPA, cannot be *mutatis mutandis* applied in Indian social g  
context. It is submitted that in US creating, distributing and receiving sexually explicit material i.e. pornography between consenting adults is held to be a facet of speech and expression protected by the First Amendment, which can never be a protected freedom in the Indian context.

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- a 67. It is submitted that in one of the first landmark judgments rendered by the US Supreme Court in *Roth*<sup>48</sup>, it was held that generally obscenity was not a protected speech under the First Amendment. However, it carved out a distinction between obscenity and sex, to hold that only such sexually explicit (obscene) material which deals with sex in a manner appealing to prurient interest was not protected under the First Amendment. Whereas,
- b portrayal of sex, in art, literature and scientific works, was constitutionally protected freedom of speech and press. The relevant paras of the said judgment are quoted hereinbelow for ready reference of this Hon'ble Court:

- c "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press. (P. 26)

\* \* \*

- d However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not in itself sufficient reason to deny material the constitutional protection of freedom of speech and press." (Pp. 27 -28)

- e 68. Thereafter, the struggle of US Congress to prohibit distribution and possession of pornographic material was further abridged when the US Supreme Court, speaking through Marshall, J., in *Stanley v. Georgia*, 394 US 557 (1969)<sup>49</sup> held that the statute, insofar as it made mere private possession of obscene matter a crime, was unconstitutional under the First and Fourteenth Amendments. In a concurring opinion by Black, J. it was held that mere possession of reading matter or movie film, whether labelled as obscene or not cannot be made a crime by a State without violating the First and Fourteenth Amendments.

- f 69. Finally, the US Supreme Court in *Miller v. California*, 413 US 15 (1972)<sup>50</sup>, while defining the standards which must be used to identify obscene material which the State may regulate without infringing on the First Amendment rights of the citizen held that:

- g "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a State statute could define for regulation under Part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

- h 48 *Roth v. United States*, 354 US 476 (1957) — (Pp. 13-41 Vol. IV of compilation)  
49 Pp. 52-64 of Vol. IV of Compilation  
50 Pp. 65-89 Vol. IV of Compilation

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(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (P. 78) a

70. The US Supreme Court further held that:

"Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. (P. 78) b

\* \* \*

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating State law, as written or construed." c

71. Further, in the context of the contemporary standard test, the US Supreme Court refused to lay down any uniform national standards of precisely what appeals to the "prurient interest" or would be patently offensive and held as under: d

"Under a national Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive'. These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact finders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility." e

72. Thus, it is respectfully submitted that the above series of judgments of the US Supreme Court have conferred a licence to US citizens to produce, distribute and sell sexually explicit material with a distinction that only the said patently offensive "hard core" sexual conduct specifically defined by the regulating State law would not get the protection of the First Amendment. However, in contrast there is complete prohibition in producing, distribution and sale of sexually explicit material and pornography in India and the same f

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- a is completely banned. As such the "relevant community standard" applicable in US cannot be at all made applicable in the Indian social context.

- b 73. Furthermore, experience shows that even the distinction carved out by the US Supreme Court in *Miller v. California* (supra), between the unprotected hard core pornography and protected expression of sex having serious literary, artistic, political, or scientific value has also dissipated with passage of time. The same is evident from the fact that in guise of protected expression of sex, having serious literary, artistic, political, or scientific value, the annexed sub-categories of sexual expression is legally permitted to be created, distributed and/or sold. This in turn has conferred the status of industry to porn business which presently generating revenues to the tune of billions of dollars per year. A list of pornographic sub-categories which has found its way in expression of free speech protected by First Amendment in US is annexed hereto and marked as Annexure A.

- d 74. Thus, vagueness challenge raised in *Reno*<sup>51</sup> and *Ashcroft*<sup>52</sup> has to been seen in the aforesaid context wherein the issue was that of circulation of pornographic material which was protected under the First Amendment; there were less restrictive means i.e. filtering system available to the Government through which access of pornographic material to children can be restricted; that filtering system was more effective than the statute; and the main ground of vagueness challenge was that the statute sweeps more broadly than necessary and thereby chills the speech of an adult.

- e 75. It is respectfully submitted that the said distinction between "adult speech" and "minor speech" is unavailable in India, wherein power has been conferred on the legislature under Article 19(2) to place blanket ban on the pornographic material in the interests of "decency and morality".

- f 76. Thus, in Indian context the words "grossly offensive and menacing in character" in the context of decency and morality have to take colour from the test laid down by this Hon'ble Court. It is submitted that this Hon'ble Court in *Areek Sarkar v. State of W.B.*, (2014) 4 SCC 257<sup>53</sup>, after referring to all the prior judgment rendered by this Hon'ble Court at para 23 held as under:

- g "23... A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire. The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in

51 521 US 844 (1997) *Reno, Attorney General of United States v. ACLU*, pp. 114-168 of Vol. IV of Compilation

h 52 542 US 656 *Ashcroft v. American Civil Liberties Union* (pp. 169-204 of Vol. IV of Compilation)

53 1 F 3d 181 *ACLU v. Mukasey* (pp. 205-230 of Vol. IV of Compilation)

53 (Pp. 273-286 Vol. IV of Compilation — paras 13 to 26, para 23 at p. 284 of compilation)

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which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of 'exciting lustful thoughts' can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards." a

*Applicability of "Strict Scrutiny Test" to adjudge the vires of Section 66-A of the IT Act*

77. It is further respectfully submitted that while raising a challenge to the vires of Section 66-A, the petitioners in WP (C) No. 23/2013 have also referred to the strict scrutiny test applied in the *Reno* and *Ashcroft* judgments and have contended that Section 66-A is ultra vires as it fails to muster the said test. b

78. It is submitted that applicability of the strict scrutiny test in India has been considered by this Hon'ble Court in a catena of cases. Recently this Hon'ble Court in *Subhash Chandra v. Delhi Subordinate Services Selection Board*, (2009) 15 SCC 458, after referring to all the previous judgments rendered by this Hon'ble Court has held as under: c

"80. It is commonly believed amongst a section of academicians that strict scrutiny test in view of the Constitution Bench decision of this Court in *Ashoka Kumar Thakur* (supra) is not applicable in India at all. Therein reliance has been placed on *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146 wherein this Court stated: d

'36. The strict scrutiny test or the intermediate scrutiny test applicable in the United States of America as argued by Shri Salve cannot be applied in this case. Such a test is not applied in Indian courts. In any event, such a test may be applied in a case where a legislation ex facie is found to be unreasonable. Such a test may also be applied in a case where by reason of a statute the life and liberty of a citizen is put in jeopardy. This Court since its inception apart from a few cases where the legislation was found to be ex facie wholly unreasonable proceeded on the doctrine that constitutionality of a statute is to be presumed and the burden to prove contra is on him who asserts the same.' e

In a concurrent opinion, one of us, S.B. Sinha, J., stated, thus:

'92. Mr Nariman contended that provision for reservation being a suspect legislation, the strict scrutiny test should be applied. Even applying such a test, we do not think that the institutional reservation should be done away with having regard to the present day scenario....' g

81. *Saurabh Chaudri* (supra) read as a whole therefor refused to apply the strict scrutiny test in the case of reservation evidently having regard to clauses (1) and (4) of Articles 15 and 16 of the Constitution of India. It is noteworthy to point out that the facts of this case did not bear h

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a out an ex facie unreasonableness and therefore the Court did not employ the strict scrutiny test.

82. The Constitution Bench in *Ashoka Kumar Thakur* (supra), itself, held:

b “252. It has been rightly contended by Mr Vahanvati and Mr Gopal Subramaniam that there is a conceptual difference between the cases decided by the American Supreme Court and the cases at hand. In *Saurabh Chaudri v. Union of India* it was held that the logic of strict classification and strict scrutiny does not have much relevance in the cases of the nature at hand.” (emphasis supplied)

c *Saurabh Chaudri* (supra) itself, therefore, points out some category of cases where strict scrutiny test would be applicable. *Ashoka Kumar Thakur* (supra) solely relies upon *Saurabh Chaudri* to clarify the applicability of strict scrutiny and does not make an independent sweeping observation in that regard. We are of the opinion that in respect of the following categories of cases, the said test may be applied:

d 1. Where a statute or an action is patently unreasonable or arbitrary. (See *Mithu v. State of Punjab*, (1983) 2 SCC 277.

2. Where a statute is contrary to the constitutional scheme. [See *E.V. Chinniah* (supra)].

3. Where the general presumption as regards the constitutionality of the statute or action cannot be invoked.

e 4. Where a statute or execution action causes reverse discrimination.

5. Where a statute has been enacted restricting the rights of a citizen under Article 14 or Article 19 as for example clauses (1) to (6) of Article 19 of the Constitution of India as in those cases, it would be for the State to justify the reasonableness thereof.

f 6. Where a statute seeks to take away a person's life and liberty which is protected under Article 21 of the Constitution of India or otherwise infringes the core human right.

7. Where a statute is 'expropriatory' or 'confiscatory' in nature.

8. Where a statute prima facie seeks to interfere with sovereignty and integrity of India.

g However, by no means, the list is exhaustive or may be held to be applicable in all situations.”

79. It is submitted that it is not the case of the petitioners that (a) State has no compelling interest in enacting Section 66-A and that (b) other least restrictive means are available to advance the said interest. The only ground is that the said section is not narrowly tailored.

h 80. In this context, it is respectfully submitted that in view of the submission made by UOI that the words used in Section 66-A are not

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arrangement of words "expressed as rules" but an arrangement of words "expressed as principles or standards"<sup>54</sup>, hence requires purposive interpretation, it is submitted that Section 66-A is narrowly tailored and hence *intra vires* the Constitution of India. a

81. In case if there is any further ambiguity found in the language of Section 66-A, it is respectfully submitted that by applying the principle of "*ut res magis valeat quam pereat*", this Hon'ble Court can narrowly tailor the language of Section 66-A by reading into the test referred by UOI in the judgments contained in *Compilation of Judgments* Vol. I and VI and make the statute workable. The said tests are summarised as under: b

(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi-racial society. c

*Director of Public Prosecutions v. Collins* — (2006) 1 WLR 2223 at paras 9 and 21

*Connolly v. Director of Public Prosecutions* — (2008) 1 WLR 276(2007) 1 All ER 1012

House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" at p. 260 of *Compilation of Judgments*, Vol. I, Part B. d

(ii) Information which is directed to incite or can produce imminent lawless action. *Brandenburg v. Ohio*, 395 US 444 (1969);

(iii) Information which may constitute credible threats of violence to the person or damage;<sup>55</sup> e

(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances;

*Terminiello v. Chicago*, 337 US 1 (1949)

(v) Information which advocates or teaches the duty, necessity or propriety of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify/glorify such violent means to accomplish political, social, economical or religious reforms. (*Whitney v. California*, 274 US 357) f

(vi) Information which contains fighting or abusive material. g

*Chaplinsky v. New Hampshire*, 315 US 568 (1942)

(vii) Information which promotes hate speech i.e.

54 Purposive Interpretation in Law — Aharon Barak, p. 197 h

55 House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" at p. 268. *Compilation of Judgments*, Vol. I, Part B

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- a (a) Information which propagates hatred towards an individual or a group, on the basis of race, religion, casteism, ethnicity.
- (b) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.
- b (c) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.
- (viii) Satirical or iconoclastic cartoons and caricatures which fail the test laid down in *Hustler Magazine, Inc. v. Falwell*, 485 US 46 (1988)
- c (ix) Information which glorifies terrorism and use of drugs;
- (x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking.<sup>56</sup>
- (xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it.
- d *Aveek Sarkar v. State of W.B.*, (2014) 4 SCC 257
- (xii) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.
- e *Aveek Sarkar v. State of W.B.*, (2014) 4 SCC 257

IV. On Section 66-A

82. The very fundamental foundation of the petitioner's case that provisions contained in Section 66-A of the Information Technology Act, 2000 scuttle freedom of speech and expression as enshrined under Article 19(1)(a), is misconceived since the said provisions neither intend to nor can be interpreted to scuttle freedom of speech and expression of any citizen.

83. At the outset, it is clarified that if any provision of the Information Technology Act, 2000 is found to be in conflict with the freedom guaranteed in Article 19(1)(a) of the Constitution of India, the same will have to be read in the context of and subject to Article 19(2) of the Constitution.

84. However, from the following true statutory interpretation emerging from the scheme of the Act, it may not be necessary to dwell much on the question as to whether the provisions offend Article 19(1)(a) or not since it is the case of the Central Government that if any of the provisions are offending

<sup>56</sup> House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media and Criminal Offences" at p. 268. *Compilation of Judgments*, Vol. 1 Part B

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the freedom of speech and expression, the Central Government does not defend that part of the provision. a

*Cyber crimes*

85. The Act in the question deals with the cyber world and the technology specific criminal offences committed in the cyber world which have no physical form but have only virtual existence. The element of anonymity and complete absence of territorial borders in cyberspace makes the internet an attractive medium for criminals to commit various cyber offences using new technologies which are being evolved rapidly. b

86. On true construction, the penal provisions contained in the Act necessarily deal with such cyber offences which has nothing to do with any citizens' freedom of speech and expression or any other fundamental or constitutional rights. In fact the said penal provisions seek to protect the rights of citizens of India guaranteed under Article 21 of the Constitution as would be clear from the following discussion. c

87. The use of cyberspace is rampant not only for committing conventional crimes such as theft, extortion, forgery through the use of computers, etc. but with continuously evolving technology, various new forms of crimes are emerging such as hacking, phishing, vishing, spamming, Trojan and other malware attacks, etc. The penal provisions essentially deal with such online criminal offences which have a serious potential not only to damage an individual but also to damage and destroy not the computer system of an individual citizen and can potentially lead to bringing the functioning of vital organisations and, in extreme cases, the country to a standstill as explained hereunder. d e

88. Due to the recent advent of internet technology and simultaneous growth of criminal activities in this virtual world, several countries have made statutory penal provisions. Realising the extreme need for special laws for such technology specific crimes, where newer methods are invented by techno-savvy offenders, large number of legislations are made in other countries, though in India, the IT Act, 2000 is the only legislation which seeks to encompass every form of cyber activities to protect the citizens: f

(i) The Information Technology Act, 2000 and amendments is equivalent to at least 45 (and counting) US Federal enactments;

(ii) The Information Technology Act, 2000 and amendments is equivalent to at least 598 (and counting) US State enactments; and g

(iii) The Information Technology Act and amendments is equivalent to at least 16 (and counting) UK enactments.

89. The cyber crimes can broadly be classified into the following two categories:

(i) Crimes committed by using computer or computer network; h



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- a (ii) the computer or computer network itself is the target of the crime.

90. As explained hereunder, the scheme contained in *Chapter XI* of the Information Technology Act, 2000 deals with cyber crimes in the below mentioned three broad categories:

- b (i) Crime against the nation — cyber terrorism, etc.  
(ii) Crime against citizens — cyber stalking, data theft, intimidation, extortion, etc.  
(iii) Crime against property — credit card frauds, intellectual property theft, etc.

*Analysis of Chapter XI*

- c 91. The following analysis of various provisions contained in Chapter XI of the Act requires to be considered so as to derive the real legislative intent in penal provisions contained in Section 66-A of the Act. Section 65 of the Information Technology Act, 2000 reads as under:

- d "65. *Tampering with computer source documents.*—Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy, or alter any computer source code used for a computer, computer program, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

- e *Explanation.*—For the purposes of this section, 'computer source code' means the listing of programs, computer commands, design and layout and program analysis of computer resource in any form."

The said section, for its proper understanding, can be bifurcated in a tabular form.

- f 92. To understand the real purport and meaning of the said penal offence, it is necessary to understand the term "computer source code" since any concealment, destruction or alteration in "computer source code" is made a penal offence. To understand "computer source code", it is necessary to understand the term "computer programming" upon which the definition of "computer source code" is based which is explained under:

*"Computer programming*

- g Programming is a way of sending instructions to the computer. These instructions are relayed to the computer by using 'programming languages'. These languages are:

- h (a) Machine languages,  
(b) Assembly languages, and  
(c) High-level languages.

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<i>Machine language</i>	<i>Assembly language</i>	<i>High-level language</i>
First generation language	Second general language	Third/Fourth/Fifty generation language
Difficult to understand. It is a machine code consisting entirely of the 0s and 1s of the binary number system.	Easier to understand. English-like abbreviations replacing strings of 0s and 1s, creating source files	Much easier to understand. Language's syntax is much closer to human language.
The only language that a computer understands.	Needs translator programs called assemblers (or compilers) to translate source files (or commands) into machine language.	Needs translator programs called assemblers (or compilers) to translate source files (or commands) into machine language.

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The programming, thus, is a complex process of building blocks of information systems. It involves five steps to create individual programs:

- (a) Needs analysis,
- (b) Systems design,
- (c) Development,
- (d) Implementation, and
- (e) Maintenance

d

These five steps represent 'life cycle' of a programme. It all begins with identification and understanding of a need or a problem of the end users. It is followed by the design phase to 'articulate' the logical steps in solving the proposed problem using techniques like flow charts, circles and message pipes and pseudocodes. The next step [development] involves writing the instructions to the computer, called source code, as well as testing those statements after they are written. It is the most time-consuming phase of the entire 'life cycle' as it includes writing code, compiling, correcting and rewriting. Once, the programme is tested successfully without 'syntax' and 'logical' errors, it is installed on the hardware for use (implementation). The work of the programmer continues as the installed programme may require fixing of new errors (bugs), addition, deletion or modification of certain functionalities (maintenance).

e

f

g

The computer programme whether written in machine language, assembly language or high-level language is known as the source code."

93. Having explained the term "computer programming", the statutory definition of "computer source code" as envisaged in Section 65 requires to be examined which makes it comprehensive as it includes the listing of programs, computer commands, design and layout and programme analysis of computer resource in any form. The term "computer source code" as

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- a defined in the Act incorporates the entire gamut of programming process. It includes computer commands/programming codes (machine, assembly and high-level), design prototypes, flow charts/diagrams, technical documentation, design and layout of the necessary hardware, program-testing details etc. Furthermore, it is important to know that the Act makes no mention whether the source code exists in tangible (on paper) or intangible
- b (electrical impulses) form. The Act accepts the computer source code in both tangible and intangible form. Importantly, by virtue of the Explanation, the term "computer source code" also includes the software program's "object code" as well.

94. To illustrate, it may be stated that if any program is designed for preparation of Class XII results, the entire programming would depend upon the relevant "computer source code".
- c

95. To give an extreme example, if anyone wants to indulge into cyber warfare, he will have to understand the "computer source code" of the computer system of "critical information infrastructure"; amending/altering of which would produce catastrophic results. Power systems, nuclear
- d systems, etc. are critical infrastructure systems.

96. Similarly, the term "computer programme" [as defined under Section 2(i)], "computer system" [as defined under Section 2(i)] or "computer network" [as defined under Section 2(j)] which is substituted while amending the Act [vide Act 10 of 2009] requires to be examined.

- e 97. Though the above-referred terminology may not fall out of consideration of and adjudication of this Hon'ble Court directly, however, it would be crucial to examine the same since it is the case of the Central Government that Section 66-A which uses the expressions like "causing annoyance", "causing inconvenience", etc. essentially and mainly intend to deal with such cyber crimes and has no relation with freedom to speech and
- f expression of any of the citizens as explained hereinunder.

98. Section 66 reads as under:

"66. *Computer related offences.*—If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

- g *Explanation.*—For the purposes of this section—

(a) The word 'dishonestly' shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860).

(b) The word 'fraudulently' shall have the meaning assigned to it by Section 25 of the Indian Penal Code (45 of 1860).

- h 99. Section 66 necessarily penalises the civil contraventions contemplated under Section 43 of the Act.

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100. Section 66-A reads as under:

"66-A. *Punishment for sending offensive messages through communication service, etc.*—Any person who sends, by means of a computer resource or a communication device,—

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

*Explanation.*— For the purpose of this section, terms 'electronic mail' and 'electronic mail message' mean a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, images, audio, video and any other electronic record, which may be transmitted with the message."

101. On a proper interpretation of Section 66-A, the following broad essential ingredients appear and they have a specific purpose in the context of technology specific cyber crimes and keeping the new evolving technologies almost everyday in mind:

(i) mere "sending" is an offence;

(ii) sending of an "information" is an offence;

(iii) the medium of sending should be either (a) computer source, or (b) a communication device.

102. Each of the penal provisions contained in sub-sections (a), (b) and (c) of Section 66-A seek to target and take into consideration different nature of offences and depending upon the technology and techniques used, the legislature has used phrases accordingly. These provisions, however, can never be construed as scuttling the freedom of speech and expression of any citizen.

103. To be an offence under Section 66-A, the accused must have sent any "information" or "electronic mail" or "electronic mail message" as contained in Sections 66-A (a), (b) and (c). The entire case of the petitioner proceeds with reference to hypothetical examples of some "posts" made by the citizens either on Facebook, Twitter or other social media sites and an attempt is made to link such posts with terms like "annoyance", "inconvenience", etc. as used in Section 66-A.

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a 104. As a matter of fact, while dealing with cyber crimes and while considering the validity of a legislation concerning cyber crimes, the traditional doctrines of interpretation and conventional jurisprudence may not render much assistance as each word has a different connotation and meaning in the context of cyber crimes.

b 105. As explained above, under Sections 66-A(a) and (b) of the Act sending "information" is an offence. *The term "information" has a different connotation in the context of cyber crimes and is defined under Section 2(v) of the Act which reads as under:*

"2. (v) 'information' includes data, text, images, sound, voice, codes, computer programs, software and databases or micro film or computer generated micro fiche;"

c 106. The information may include message, text, images, etc. but it essentially includes, in the parlance of cyber crimes, (1) data, (2) computer programs, (3) software and databases, or (4) micro film or computer generated micro fiche.

d 107. The term "data" as used in Section 2(v) of the Act has again a different connotation in the parlance of cyber law and is statutorily defined under Section 2(o) of the Act which reads as under:

e "2. (o) 'data' means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

f 108. In the above context, when anyone sends, by means of "computer source" [as defined under Section 2(k) of the Act] or a "communication device" [as defined under amended Section 2(ha) of the Act] any "information" [as defined under Section 2(v) of the Act] which includes "data" as defined under Section 2(o) of the Act for the purpose of committing technology specific offences that Section 66-A would be attracted which has no co-relation with any citizens' freedom of speech and expression so far as "causing annoyance", "causing inconvenience" or "causing obstruction", etc. are concerned.

g 109. It is the specific case of the Central Government that Chapter XI requires to be read as a complete code providing for each category of cyber crime wherein the legislature has sought to take into account all cyber crimes most of which have no connection with the citizens' right under Article 19(1)(a) of the Constitution of India since they are technology specific crimes and the target of the crime can either be an individual, or a computer system of an individual, a particular section of people or in gross cases, the entire country.

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VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India (*contd.*)

110. The Central Government makes it very clear that the phrases "annoyance", "inconvenience", "danger" or "obstruction" as used in Section 66-A of the Act has no co relation or connection with any citizen's freedom of speech and expression. In other words, if as a result of a citizen exercising his freedom of speech and expression, he causes "annoyance", "inconvenience", "danger" or "obstruction" while sending anything by way of computer resource or communication device, it will not be a penal offence either under Section 66-A(b) or 66-A(c) of the Act. a  
b

*Analysis of Section 66-A and its applicability*

111. To appreciate the legislative intent behind use of expression like "annoyance", "inconvenience", "danger", "obstruction" and "injury" as used in clause (b) of Section 66-A and to correctly comprehend offences under clause (c) of Section 66-A, the following types of cyber crimes are required to be briefly kept in mind. The illustration given hereunder are only illustrative and cyber crimes take many forms other than illustrated below: c

(a) *Phishing*— In phishing, the criminal poses as a genuine service provider or institution, etc. and sends "information" (like emails) requesting for updating records such as credit card details, etc. and thereby acquires passwords and personal details of an innocent victim viz. internet user. This is also known as "spoofing" (i.e. concealing one's true identity). The details so gathered are misused for committing financial and other frauds/offences. d

(b) *Vishing*— When phishing is conducted using "telecalling", it is known as "vishing" (i.e. "verbal phishing"). A criminal makes a phone call posing to be either a bank representative or any other authority, making his target innocent and unaware internet users who will feel duty-bound to reveal his internet PIN, credit card details, password, bank account number, etc. and misuses the same either to commit financial frauds or to commit other offences. e

There are software available using which the caller can change his voice to the voice of any known/unknown persons and the recipient would genuinely believe that he is talking to either a known person or to a representative of some organisation. Millions of dollars/rupees are lost and other offences committed world over by these using vishing software. f

(c) *Spoofing*—Spoofing denotes a crime where a person on the internet disguises his identity. Hackers and crackers commit offences of spying, data thefts, steal sensitive information, commit credit card frauds and identity thefts using spoofing techniques. g

(d) *Spamming*—Sending unsolicited information, mainly through emails and flooding the recipient's mail box for committing various offences and also for sending some contaminated viruses. h

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VII. Mr Tushar Mehta, Additional Solicitor General, for the Union of India (contd.)

- a (e) *Viruses*—Viruses are programs that damage a computer system by deleting data and/or replicating itself to other computers or damage the disk of the computer. They are also used to transfer data from one computer to another computer without the knowledge and consent of the victim. Different viruses perform different functions. Some viruses even take control of command of a victim's computer which commands can be operated by the accused who has sent such virus. Some viruses can continuously spy on the victim's activities, etc.
- b

112. The following basic viruses are found in vogue though new and new viruses are formulated by cyber criminals rapidly. On a rough estimate, world over more than 10,000 new viruses are formulated per day by cyber criminals.

- c 113. *Types of viruses in vogue:*

(i) *Melisa Virus*.—This virus can be circulated through emails which, when accessed, would lead to mailing the first 50 emails addresses on a recipient's Microsoft outlook address book automatically and all would be infected with the virus.

- d The ultimate goal/offence/effect of this depends upon the programme sent through this virus. All major companies including Microsoft, Intel and Lucent technologies were severally affected which is known to have caused a loss of more than USD 400 million to entities in North America.

- e (ii) *Love Bug Virus*: This is a virus which is spread as an attachment to an email message with the special header "I love you". If a person accesses the attachment the virus transmits some email to persons mentioned in the address book of the recipient which deletes contents of the recipients and overrides all the files residing in the respective computers. These viruses have damaged many computer systems across the world and had even damaged critical government computer networks in other parts of the world.

- f (iii) *Trojan Horse*.—There are several kinds of "Trojan Horse" (a category of virus) categorised according to the harm they cause to a computer system of the unaware internet user including remote access Trojan, data sending Trojan, destructive Trojan, proxy Trojan, ftp Trojan, denial of service attacks Trojan, security software disabler Trojan, etc. A Trojan can even infect a "computer" and unauthorisedly activate its webcam and microphone attached to a system and click/record the private life of a person's bedroom or record personal and confidential conversations. It is required to be kept in mind that Smart LED TVs used everywhere are also within the statutory definition of "computer".
- g

- h (iv) *Logic Bomb*: Logic Bomb is a programme which remains inactive till the time some part of the programme is activated by the criminal as per his need through a code at his chosen date or time.

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*Illustrative cases which would fall within the statutory meaning of the terms "annoyance", "inconvenience", "danger", "obstruction", "injury" in cyber crime parlance under Section 66-A(b) and/or may fall under Section 66-A(c)* a

114. In a recent true case one person created a fake email account showing his user name as "DSOI Delhi". "DSOI" stands for "Defence Service Officers Institute". It is a club whose members are senior defence officials of the rank of Lt. Col. and above. The accused in this case sent spam mails to all members of the Club repeatedly which required the recipients to download one application (mobile app). The mail ID is created in New Delhi but the mails are sent from a US-based server. Since the matter is under investigation, further details are not mentioned. b

115. In all illustrative cases pointed out hereinunder, depending upon which malware/virus is sent by the cyber criminal and what is the effect of such "information" being sent either upon the victim individual or upon his computer/computer system, it can be decided whether the offence would fall either within the meaning of "annoyance", "inconvenience", "danger", "obstruction", etc. as used in Section 66-A in the parlance of cyber laws. c

116. In another case the accused had the mail account having "<hjjoa@tele2.se>" as his email ID. The accused disguised his username to be "Microsoft Account Team". He sent spam mails to a large section of society. A message contained in the said mail would clearly indicate to all unaware recipients that it has come from 'Microsoft' and, therefore, would feel obliged to click as desired in the said mail since there is a "criminal intimidation" contained therein that if the mail is not responded by "clicking", the recipients' Microsoft account will be terminated permanently. When a recipient clicks as mentioned in the said mail, a computer virus enters into their respective systems. Since the accused did not take care to create even a fake ID, he could be traced and arrested. This case may fall both under Sections 66-A(b) and (c). d

117. Similarly, one spam mail was sent in the name of Reserve Bank of India. The mail clearly gave an impression to an unaware net user that it has come from RBI. The moment the recipient would click "update here", the site would open and would demand personal credentials and account details of the recipient which were being used for committing offences. A similar mail was sent in the name of Governor of Reserve Bank of India. Similar is the case of an email purported to be from Tax Refund Department of Income Tax Department. e

118. Another mail purported to be sent from outside the country by accessing computer system in India, the sender i.e. cyber criminal spoofed his account to show that the mail is originated from the office of the Indian f



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- a Embassy located in China. The mail was sent to senior officers of MEA, Government of India at New Delhi. The mail contained a document which had embedded Trojan virus. The purpose of the mail was to infect, steal and monitor the information residing in the computer systems of the senior officers of MEA, India.

- b 119. A classic case of "criminal intimidation" as defined under Section 66-A(b) is the case of "Ransomware" sent through a spam mail. The moment the recipient i.e. unaware victim net user accesses the mail, all his data residing in his computer system gets encrypted. Such important data becomes unusable trash for the victim. The recipient would thereafter receive another mail demanding huge money to decrypt the data and permit the net user to access the data residing in his computer. This would fall both under  
c "obstruction" and "criminal intimidation" as contemplated under Section 66-A(b) and if the ransom is not paid, the victim's entire data would be destroyed and would cause "damage" as contemplated under Section 66-A(b).

- d 120. It is submitted that considering the rapid pace with which new techniques of cyber crimes resulting into different adverse affects on honest internet users and/or their computer/computer systems, it is desirable that any expression used in penal provisions concerning cyber laws are not put in any straitjacket definitions. The conventional doctrine that expressions used in a penal statute must have specific connotation requires to be liberally applied while interpreting a penal provision concerning cyber offences failing which  
e the law cannot keep pace with ever-changing techniques and ever-expanding technologies of commission of crimes in the world.

- f 121. The above illustrations are the cases which are contemplated by the legislature under Sections 66-A(b) and (c). However, a possibility of a criminal using "information" in the form of "message", "text", "images", "sound" cannot be ruled out which can virtually cause either "annoyance" or "inconvenience" depending upon the facts of each case.

- g 122. Similarly there are malwares having a feature of auto-generated download of "information" into the recipient's computer which would jam recipient's computer causing not only annoyance but tremendous "inconvenience" since he will not be able to use his "computer" due to the  
jamming of the system by unsolicited and unwarranted downloading of "information".

- h 123. However, such instances would be exceptional instances resulting from gross cases and desirability of investigation based upon such allegations will have to be determined based upon facts of each case. If some individual chooses to misuse the provisions for the purpose for which it is not intended or resorts to the expressions "inconvenience" or "annoyance" in a casual

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manner, it would be a case of abuse of process of law and can be remedied either under Section 482 or Article 226. The same, however, would not be a ground for declaring the provisions to be unconstitutional if they are otherwise found to be constitutional. a

124. The terms "inconvenience" and "annoyance" in the context of cyber crime would also take a different meaning than their conventional linguistic meaning if an offender floods an individual email account with 500 mails a day blocking all genuine incoming mails and if such an act continues persistently, it can be a penal offence since it would result into both "annoyance" and "inconvenience". b

125. At the first glance, the demarcating line between the provisions of Sections 66-A(b) and (c), apparently, may appear to be blurred. However, the main distinction is that Section 66-A(b) applies to all "information" which is a wider term as defined under Section 2(v), while Section 66-A(c) applies only to emails. The penal provisions are bifurcated in three categories so as to ensure that each and every future contingency can be taken care of and for every newly invented cyber crime, the citizens get protection of a penal provision. c

*Distinction between Section 66-A(c) and Section 66-D* d

126. A perusal of Sections 66-A(c) and 66-D *prima facie* gives an impression that there is duplication or overlapping of the same criminal act in two different penal provisions. However, on a closer scrutiny, it can be easily shown that they provide for different contingencies. While in an offence under Section 66-A(c), it is not necessary that recipient of the mail is actually cheated but under Section 66-D, it is necessary that cheating takes place resulting into loss to the recipient. There can be cases in which the recipient is not "cheated" viz. divested of any tangible or intangible property. For example, a virus sent through email may only "spy" on the recipient or "monitor" his computer system and the contents being uploaded in the system. In such a case, since ingredients of Section 420 are not attracted, Section 66-A(c) provides for a separate category of offence. e

127. In most cases, stage of Section 66-A(c) is the beginning of the offence and if not prevented, Section 66-D is the outcome of that beginning. The word "cheating" is defined under Section 420 IPC which reads as under: f

"420. *Cheating and dishonestly inducing delivery of property.*—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine." g

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- a 128. To give a very basic illustration, it may be pointed out that one accused has created a fake website i.e. "delhijalboard.in" in which he has created a "payment gateway" to accept water utility payments by residents of Delhi. If the recipient makes the payment, the ingredients of "cheating" would be found and the offence would be both under Sections 66-A(c) and 66-D.
- b 129. Under Section 66-D, the words used are "cheating by impersonation" which necessarily imply impersonating an individual. On the other hand, Section 66-A(c) is worded in such a way that it deals with only the origin which may be from an institution or an individual.
- c 130. Another distinction between Sections 66-A(c) and 66-D is the medium used. While Section 66-A(c) is confined only to emails as a mode of communication, Section 66-D takes within its sweep other modes also, namely, use of "computer resource" for an act of cheating by impersonation. The term "computer resource" is defined under Section 2(k) which reads as under:
- d "2. (k) 'computer resource' means computer, computer system, computer network, data, computer database or software;"
- e 131. Thus "computer database" covers sites like "shadi.com" containing profiles of prospective brides and grooms. If an individual uses his impersonated profile in the said computer resource, he would fall only under Section 66-D and not under Section 66-A(c). Since the medium of impersonation is not an email but computer database.

VIII. Mr P.S. Narasimha, Senior Advocate on behalf of the State of Kerala, Writ Petition (Criminal) No. 196 of 2014

- f 1. It has been contended by the petitioners that the State of Kerala lacked the legislative competence while enacting Section 118(d) of the Kerala Police Act, 2011 (hereinafter "the Act") as the subject-matter covered under clause (d) of Section 118 is relatable to Entry 31 read with Schedule VII List I Entry 93.
- g 2. It has further been contended that Section 118(d) is relatable to List III Entry 1 and is, hence, repugnant to Central legislations like the Information Technology Act, 2000 and the Penal Code, 1860.
- h 3. The above submission is fallacious for the following reasons:
- (I) The Act was enacted by the State Legislature in exercise of its legislative powers under Article 246 read with Entries 1, 2 and 64 of Schedule VII, being matters relating to "public order" and "police".
- (II) The contention of the alleged incompetence of the legislature to enact the said statute is against established principles of examining the legislation in its pith and substance.

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(III) The Act is relatable to Entries 1, 2 and 64 of Schedule VII and as such there is no question of repugnancy as the same would arise only in context of State and Central legislations arising out of the same Entries of the Concurrent List alone. a

*Re: Submission I*

4. The Act was enacted to “consolidate and amend the law relating to the establishment, regulation, powers and duties of the police force in the State of Kerala and for matters concerned therewith and incidental thereto”. Chapter II of the Act deals with the duties and functions of the police; Chapter III deals with police stations and their establishment; Chapter IV deals with the general structure of the police force; Chapter V deals with duties and responsibilities of a police officer; Chapter VI deals with police regulations; Chapter VII deals with service conditions; Chapter VIII deals with offences and punishments. b  
c

5. It must be noted that statutes like the Karnataka Police Act, 1963 (Chapter VIII), the Bombay Police Act, 1951 (Chapter VII) and the Bihar Police Act, 2007 (Chapter XI), to name a few, which pertain to creation of a police force, also contain provisions relating to offences. Similarly, in Chapter VIII of the Act, Section 118 in particular deals with penalty for causing grave violation of public order or danger. Section 118(d) makes it an offence if any person “causes annoyance to any person in an indecent manner by statements or verbal comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means”. The need for such a provision arises due to the advancement in technology and methods of commission of offences. With the advent of wireless and mobile technology, crimes can be committed through highly advanced communication devices. Therefore, in order to curb and punish such crimes and in order to ensure maintenance of public order, Section 118(d) has been enacted. d  
e

6. It has been time and again held by this Hon’ble Court that the expression “public order” is of a wide connotation. (See *Supt., Central Prison v. Ram Manohar Lohia*, AIR 1960 SC 633; *Romesh Thappar v. State of Madras*, AIR 1950 SC 124; *Brij Bhushan v. State of Delhi*, AIR 1950 SC 129.) It must be noted that clauses (a) to (c) and (e) to (i) deal with offences having a public order dimension. Under such circumstances, it is submitted that clause (d) will have to be read *ejusdem generis* with the other sub-sections. In other words, the word “annoyance” in clause (d) must assume sufficiently grave proportions to bring the matter within interests of public order. [See *Madhu Limaye v. Sub-Divisional Magistrate*, (1970) 3 SCC 746 at 24.] f  
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VIII. Mr P.S. Narasimha, Senior Advocate, for the State of Kerala (*contd.*)

- a 7. Viewing the enactment as a whole, it can be seen that the main purpose of the Act is to provide for the setting up of a police force to protect and preserve, inter alia, public order, which is traceable to Schedule VII List II Entries 1 and 2.

*Re: Submission II*

- b 8. It is submitted that it would indeed be an erroneous approach to view a statute not as an organic whole, but as a collection of sections and then proceeding to examine which of the sections fall under the respective Lists of Schedule VII and accordingly determine the vires of the Act in question. The courts ought to, it is submitted, determine the true purport of the legislation and examine the statute as a whole. According to this Hon'ble Court in *A.S. Krishna v. State of Madras*, 1957 SCR 399:

- c "The position, then, might thus be summed up: When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, *one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such*
- d *examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.* It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere
- e collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not." (At p. 410)

- f 9. Furthermore, in *K.C. Gajapati Narayan Deo v. State of Orissa*, 1954 SCR 1, a judgment which was also relied upon by the petitioner, this Hon'ble Court has held that it is the substance of the Act and not merely the form or outward appearance that is material. (see p. 12). It must be noted that the said judgment, as well as *State of Karnataka v. Ranganatha Reddy*, (1977) 4 SCC 471, which was also cited by the petitioner, are authorities on the proposition that an enactment has to be examined as a whole when the competence of the legislature to enact the same has been challenged.

- g 10. It is submitted that the pith and substance of the Act, read as a whole, is to provide a statutory framework governing the powers and functions of the police, in order to preserve and protect public order, in the State of Kerala. The doctrine of pith and substance postulates that the impugned law is substantially within the legislative competence of the particular legislature
- h that made it, and has only incidentally encroached upon the legislative field

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of another legislature. As observed by this Hon'ble Court in *State of Bombay v. Narottamdas Jerhabhai*, 1951 SCR 51: a

"The doctrine saves this incidental encroachment if only the law is in pith and substance within the legislative field of the particular Legislature which made it." (At p. 125)

11. The aforesaid principle was further reiterated in *Gimar Traders (3) v. State of Maharashtra*, (2011) 3 SCC 1, wherein the Court held: b

"The primary object of applying these principles is not limited to determining the reference of legislation to an Entry in either of the Lists, but there is a greater legal requirement to be satisfied in this interpretative process. A statute should be construed so as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*. Once it is found that in pith and substance, an Act is a law on a permitted field then any incidental encroachment, even on a forbidden field, does not affect the competence of the legislature to enact that law." (at para 181) c

12. Assuming, but not conceding, that Section 118(d) per se falls within the realms of List I, after examining the section divorced from the rest of the Act (which is impermissible in law), it is submitted that such an encroachment cannot affect the validity of a statute on the grounds of competence. The encroachment in the domain of Central laws, if any, is merely incidental in nature, which is permissible as held in a catena of decisions of this Hon'ble Court, as already submitted. d

*Re: Submission III* e

13. The petitioner has tried to argue that Section 118(d), in isolation, is "repugnant" to Central legislations like the Information Technology Act, 2000 and the Penal Code as the Act falls within the ambit of either List I Entry 31 or List III Entry I. It is contended that the argument on behalf of the petitioner regarding repugnancy is erroneous, as stated earlier. The Act and Section 118(d) clearly falls within the ambit of Schedule VII Entries 1, 2 and 64. f

14. Further, it is submitted that the said doctrine would apply only if both laws fall under the Concurrent List [*K.T. Plantation (P) Ltd. v. State of Karnataka*, (2011) 9 SCC 1 at para 107]. As mentioned above, the provision clearly falls under the relevant Entries of List II [Entry 1 (read with Entry 64) and Entry 2] and not under any Entries mentioned in List III. g

15. Taking the aforementioned submissions into account, it is contended that the legislature is competent to enact the said statute and the Act, as well as the provision in question, is within the vires of the Constitution. h

The Judgment of the Court was delivered by

- a ROHINTON FALI NARIMAN, J.— This batch of writ petitions filed under Article 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19(1)(a) of the Constitution of India. The immediate cause for concern in these petitions is Section 66-A of the Information Technology Act of 2000. This section was not in the Act as originally enacted, but came into force by virtue of an Amendment Act of 2009 with effect from 27-10-2009. Since all the arguments raised by several counsel for the petitioners deal with the unconstitutionality of this section, it is set out hereinbelow:

b “66-A. *Punishment for sending offensive messages through communication service, etc.*—Any person who sends, by means of a computer resource or a communication device—

- c (a) any information that is grossly offensive or has menacing character; or  
(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or  
d (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

- e *Explanation.*—For the purposes of this section, terms ‘electronic mail’ and ‘electronic mail message’ means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.”<sup>1</sup>

- f <sup>1</sup> The genealogy of this section may be traced back to Section 10(2)(a) of the U.K. Post Office (Amendment) Act, 1935, which made it an offence to send any message by telephone which is grossly offensive or of an indecent, obscene, or menacing character. This section was substantially reproduced by Section 66 of the U.K. Post Office Act, 1953 as follows:

“66. *Prohibition of sending offensive or false telephone messages or false telegrams, etc.*—If any person—

- g (a) sends any message by telephone which is grossly offensive or of an indecent, obscene or menacing character;  
(b) sends any message by telephone, or any telegram, which he knows to be false, for the purpose of causing annoyance, inconvenience or needless anxiety to any other person; or  
(c) persistently makes telephone calls without reasonable cause and for any such purpose as aforesaid,

- h he shall be liable on summary conviction to a fine not exceeding ten pounds, or to imprisonment for a term not exceeding one month, or to both.”

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2. A related challenge is also made to Section 69-A introduced by the same amendment which reads as follows:

*"69-A. Power to issue directions for blocking for public access of any information through any computer resource.—(1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.*

*(2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.*

*(3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine."*

3. The Statement of Objects and Reasons appended to the Bill which introduced the Amendment Act stated in Para 3 that:

*"3. A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit materials in electronic*

*(Footnote 1 contd.)*

*This section in turn was replaced by Section 49 of the British Telecommunication Act, 1981 and Section 43 of the British Telecommunication Act, 1984. In its present form in the U.K., it is Section 127 of the Communications Act, 2003 which is relevant and which is as follows:*

*"127. Improper use of public electronic communications network.—(1) A person is guilty of an offence if he—*

*(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or*

*(b) causes any such message or matter to be so sent.*

*(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—*

*(a) sends by means of a public electronic communications network, a message that he knows to be false,*

*(b) causes such a message to be sent; or*

*(c) persistently makes use of a public electronic communications network.*

*(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.*

*(4) Sub-sections (1) and (2) do not apply to anything done in the course of providing a programme service [within the meaning of the Broadcasting Act, 1990 (c. 42)]."*



a form, video voyeurism and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as phishing, identity theft and offensive messages through communication services. So, penal provisions are required to be included in the Information Technology Act, the Penal Code, the Indian Evidence Act and the Code of Criminal Procedure to prevent such crimes."

b 4. The petitioners contend that the very basis of Section 66-A—that it has given rise to new forms of crimes—is incorrect, and that Sections 66-B to 67-C and various sections of the Penal Code, 1860 (which will be referred to hereinafter) are good enough to deal with all these crimes.

c 5. The petitioners' various counsel raised a large number of points as to the constitutionality of Section 66-A. According to them, first and foremost Section 66-A infringes the fundamental right to free speech and expression and is not saved by any of the eight subjects covered in Article 19(2).  
d According to them, the causing of annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will are all outside the purview of Article 19(2). Further, in creating an offence, Section 66-A suffers from the vice of vagueness because unlike the offence created by Section 66 of the same Act, none of the aforesaid terms are even attempted to be defined and cannot be defined, the result being that innocent  
e persons are roped in as well as those who are not. Such persons are not told clearly on which side of the line they fall; and it would be open to the authorities to be as arbitrary and whimsical as they like in booking such persons under the said section. In fact, a large number of innocent persons have been booked and many instances have been given in the form of a note to the Court. The enforcement of the said section would really be an insidious  
f form of censorship which impairs a core value contained in Article 19(1)(a). In addition, the said section has a chilling effect on the freedom of speech and expression. Also, the right of viewers is infringed as such chilling effect would not give them the benefit of many shades of grey in terms of various points of view that could be viewed over the internet. The petitioners also  
g contend that their rights under Articles 14 and 21 are breached inasmuch as there is no intelligible differentia between those who use the internet and those who by words spoken or written use other mediums of communication. To punish somebody because he uses a particular medium of communication is itself a discriminatory object and would fall foul of Article 14 in any case.

h 6. In reply, Mr Tushar Mehta, learned Additional Solicitor General defended the constitutionality of Section 66-A. He argued that the legislature is in the best position to understand and appreciate the needs of the people. The Court will, therefore, interfere with the legislative process only when a statute is clearly violative of the rights conferred on the citizen under Part III of the Constitution. There is a presumption in favour of the constitutionality of an enactment. Further, the Court would so construe a statute to make it workable and in doing so can read into it or read down the provisions that are impugned. The Constitution does not impose impossible standards of

determining validity. Mere possibility of abuse of a provision cannot be a ground to declare a provision invalid. Loose language may have been used in Section 66-A to deal with novel methods of disturbing other people's rights by using the internet as a tool to do so. Further, vagueness is not a ground to declare a statute unconstitutional if the statute is otherwise legislatively competent and non-arbitrary. He cited a large number of judgments before us both from this Court and from overseas to buttress his submissions.

*Freedom of speech and expression*

7. Article 19(1)(a) of the Constitution of India states as follows:

"19. *Protection of certain rights regarding freedom of speech, etc.*—

(1) All citizens shall have the right—

(a) to freedom of speech and expression;"

Article 19(2) states:

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

8. The Preamble of the Constitution of India inter alia speaks of liberty of thought, expression, belief, faith and worship. It also says that India is a sovereign democratic republic. It cannot be overemphasised that when it comes to democracy, liberty of thought and expression is a cardinal value that is of paramount significance under our constitutional scheme.

9. Various judgments of this Court have referred to the importance of freedom of speech and expression both from the point of view of the liberty of the individual and from the point of view of our democratic form of government. For example, in the early case of *Romesh Thappar v. State of Madras*<sup>2</sup>, SCR at p. 602, this Court stated that freedom of speech lay at the foundation of all democratic organisations. In *Sakal Papers (P) Ltd. v. Union of India*<sup>3</sup>, SCR at p. 866, a Constitution Bench of this Court said that freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved. In a separate concurring judgment Beg, J. said, in *Bennett Coleman & Co. v. Union of India*<sup>4</sup>, SCC p. 828, para 98 : SCR at p. 829, that the freedom of speech and of the press is

<sup>2</sup> 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 CILJ 1514

<sup>3</sup> (1962) 3 SCR 842 : AIR 1962 SC 305

<sup>4</sup> (1972) 2 SCC 788 : (1973) 2 SCR 757

the Ark of the Covenant of Democracy because public criticism is essential to the working of its institutions.<sup>5</sup>

- a 10. Equally, in *S. Khushboo v. Kanniammal*<sup>6</sup> this Court stated, in para 45 that the importance of freedom of speech and expression, though not absolute, was necessary as we need to tolerate unpopular views. This right requires the free flow of opinions and ideas essential to sustain the collective life of the citizenry. While an informed citizenry is a precondition for meaningful governance, the culture of open dialogue is generally of great societal importance.

b 11. This last judgment is important in that it refers to the "marketplace of ideas" concept that has permeated American law. This was put in the felicitous words of Holmes, J. in his famous dissent in *Abrams v. United States*<sup>7</sup>, thus: (L Ed p. 1180)

- c "... But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That at any rate, is the theory of our Constitution."

d 12. Brandeis, J. in his famous concurring judgment in *Whitney v. California*<sup>8</sup>, said: (L Ed pp. 1105-06)

- e "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that in its Government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American Government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and

- g <sup>5</sup> Incidentally, the Ark of the Covenant is perhaps the single most important focal point in Judaism. The original Ten Commandments which the Lord himself gave to Moses was housed in a wooden chest which was gold-plated and called the Ark of the Covenant and carried by the Jews from place to place until it found its final repose in the first temple—that is the temple built by Solomon.

- h <sup>6</sup> (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299

<sup>7</sup> 250 US 616 : 63 L Ed 1173 (1919)

<sup>8</sup> 71 L Ed 1095 : 274 US 357 (1927)

imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable Government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. *To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced.* There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.” (emphasis supplied)

13. This leads us to a discussion of what is the content of the expression “freedom of speech and expression”. There are three concepts which are fundamental in understanding the reach of this most basic of human rights. The first is discussion, the second is advocacy, and the third is incitement. Mere discussion or even advocacy of a particular cause howsoever unpopular is at the heart of Article 19(1)(a). It is only when such discussion or advocacy reaches the level of incitement that Article 19(2) kicks in.<sup>9</sup> It is at this stage

<sup>9</sup> A good example of the difference between advocacy and incitement is Mark Antony's speech in Shakespeare's immortal classic Julius Caesar. Mark Antony begins cautiously. Brutus is chastised for calling Julius Caesar ambitious and is repeatedly said to be an “honourable man”. He then shows the crowd Caesar's mantle and describes who struck Caesar where. It is at this point, after the interjection of two citizens from the crowd, that Antony says:

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- a that a law may be made curtailing the speech or expression that leads inexorably to or tends to cause public disorder or tends to cause or tends to affect the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, etc. Why it is important to have these three concepts in mind is because most of the arguments of both petitioners and respondents tended to veer around the expression "public order".

- b 14. It is at this point that a word needs to be said about the use of American judgments in the context of Article 19(1)(a). In virtually every significant judgment of this Court, reference has been made to judgments from across the Atlantic. Is it safe to do so?

- c 15. It is significant to notice first the differences between the US First Amendment and Article 19(1)(a) read with Article 19(2). The first important difference is the absoluteness of the US First Amendment—Congress shall make *no law* which abridges the freedom of speech. Second, whereas the US First Amendment speaks of freedom of speech and of the press, without any reference to "expression", Article 19(1)(a) speaks of freedom of speech and expression without any reference to "the press". Third, under the US Constitution, speech may be abridged, whereas under our Constitution, reasonable restrictions may be imposed. Fourth, under our Constitution such restrictions have to be in the interest of eight designated subject-matters—  
d that is, any law seeking to impose a restriction on the freedom of speech can only pass muster if it is proximately related to any of the eight subject-matters set out in Article 19(2).

16. Insofar as the first apparent difference is concerned, the US Supreme Court has never given literal effect to the declaration that Congress shall

- e (Footnote 9 *contd.*)

"Antony—Good friends, sweet friends, let me not stir you up  
To such a sudden flood of mutiny.

They that have done this deed are honourable:  
What private griefs they have, alas, I know not,  
That made them do it: they are wise and honourable,  
And will, no doubt, with reasons answer you.

- f I come not, friends, to steal away your hearts:  
I am no orator, as Brutus is;

But, as you know me all, a plain blunt man,  
That love my friend; and that they know full well  
That gave me public leave to speak of him:

- g For I have neither wit, nor words, nor worth,  
Action, nor utterance, nor the power of speech,  
To stir men's blood: I only speak right on;

I tell you that which you yourselves do know;  
Show you sweet Caesar's wounds, poor poor dumb mouths,  
And bid them speak for me: but were I Brutus,

- h And Brutus Antony, there were an Antony  
Would ruffle up your spirits and put a tongue  
In every wound of Caesar that should move  
The stones of Rome to rise and mutiny.

All—We'll mutiny."

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make no law abridging the freedom of speech. The approach of the Court which is succinctly stated in one of the early US Supreme Court judgments, continues even today. In *Chaplinsky v. New Hampshire*<sup>10</sup>, Murphy, J. who delivered the opinion of the Court put it thus: (L Ed p. 1035) a

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cannell v. Connecticut*<sup>11</sup>, US pp. 309, 310 : S Ct p. 906." b c

17. So far as the second apparent difference is concerned, the American Supreme Court has included "expression" as part of freedom of speech and this Court has included "the press" as being covered under Article 19(1)(a), so that, as a matter of judicial interpretation, both the US and India protect the freedom of speech and expression as well as press freedom. Insofar as abridgement and reasonable restrictions are concerned, both the US Supreme Court and this Court have held that a restriction in order to be reasonable must be narrowly tailored or narrowly interpreted so as to abridge or restrict only what is absolutely necessary. It is only when it comes to the eight subject-matters that there is a vast difference. In the US, if there is a compelling necessity to achieve an important governmental or societal goal, a law abridging freedom of speech may pass muster. But in India, such law cannot pass muster if it is in the interest of the general public. Such law has to be covered by one of the eight subject-matters set out under Article 19(2). If it does not, and is outside the pale of Article 19(2), Indian courts will strike down such law. d e f

18. Viewed from the above perspective, American judgments have great persuasive value on the content of freedom of speech and expression and the tests laid down for its infringement. It is only when it comes to subserving the general public interest that there is the world of a difference. This is perhaps why in *Kameshwar Prasad v. State of Bihar*<sup>12</sup>, this Court held: (SCR p. 378 : AIR pp. 1169-70, para 8) g

<sup>10</sup> 86 L Ed 1031 : 315 US 568 (1942)

<sup>11</sup> 310 US 296 : 60 S Ct 900 : 84 L Ed 1213 : 128 ALR 1352 (1940)

<sup>12</sup> 1962 Supp (3) SCR 369 : AIR 1962 SC 1166

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- a "As regards these decisions of the American Courts, it should be borne in mind that though the First Amendment to the Constitution of the United State reading 'Congress shall make no law ... abridging the freedom of speech ...' appears to confer no power on the Congress to impose any restriction on the exercise of the guaranteed right, still it has always been understood that the freedom guaranteed is subject to the police power—the scope of which however has not been defined with precision or uniformly. It is on the basis of the police power to abridge that freedom that the constitutional validity of laws penalising libels, and those relating to sedition, or to obscene publications, etc., has been sustained. The resultant flexibility of the restrictions that could be validly imposed renders the American decisions inapplicable to and without much use for resolving the questions arising under Article 19(1)(a) or (b) of our Constitution wherein the grounds on which limitations might be placed on the guaranteed right are set out with definiteness and precision."
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19. But when it comes to understanding the impact and content of freedom of speech, in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*<sup>13</sup>, Venkataramiah, J. stated: (SCC p. 671, para 44 : SCR pp. 324F-325A)

- d "While examining the constitutionality of a law which is alleged to contravene Article 19(1)(a) of the Constitution, we cannot, no doubt, be solely guided by the decisions of the Supreme Court of the United States of America. But in order to understand the basic principles of freedom of speech and expression and the need for that freedom in a democratic country, we may take them into consideration. The pattern of Article 19(1)(a) and of Article 19(1)(g) of our Constitution is different from the pattern of the First Amendment to the American Constitution which is almost absolute in its terms. The rights guaranteed under Article 19(1)(a) and Article 19(1)(g) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made."
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- f 20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Article 19(1)(a)

21. Section 66-A has been challenged on the ground that it casts the net very wide— "all information" that is disseminated over the internet is included within its reach. It will be useful to note that Section 2(v) of the Information Technology Act, 2000 defines "information" as follows:
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"2. Definitions.—(1) In this Act, unless the context otherwise requires—

(v) 'information' includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche."

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<sup>13</sup> (1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287

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Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66-A. Information of all kinds is roped in—such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know—the marketplace of ideas—which the internet provides to persons of all kinds is what attracts Section 66-A. That the information sent has to be annoying, inconvenient, grossly offensive, etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State, etc. The petitioners are right in saying that Section 66-A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66-A.

22. In this regard, the observations of Jackson, J. in *American Communications Assn. v. Douds*<sup>14</sup> are apposite: (L Ed p. 967)

“... Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.”

#### B. Article 19(2)

23. One challenge to Section 66-A made by the petitioners' counsel is that the offence created by the said section has no proximate relation with any of the eight subject-matters contained in Article 19(2). We may incidentally mention that the State has claimed that the said section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

24. Under our constitutional scheme, as stated earlier, it is not open to the State to curtail freedom of speech to promote the general public interest. In *Sakal Papers (P) Ltd. v. Union of India*<sup>3</sup>, this Court said: (SCR p. 863 : AIR pp. 313-14, para 37)

“It may well be within the power of the State to place, in the interest of the general public, restrictions upon the right of a citizen to carry on

<sup>14</sup> 94 L Ed 925 : 339 US 382 (1950)  
<sup>3</sup> (1962) 3 SCR 842 : AIR 1962 SC 305



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- a business but it is not open to the State to achieve this object by directly and immediately curtailing any other freedom of that citizen guaranteed by the Constitution and which is not susceptible of abridgment on the same grounds as are set out in clause (6) of Article 19. Therefore, the right of freedom of speech cannot be taken away with the object of placing restrictions on the business activities of a citizen. Freedom of speech can be restricted only in the interests of the security of the State, friendly relations with foreign State, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.
- b It cannot, like the freedom to carry on business, be curtailed in the interest of the general public. If a law directly affecting it is challenged, it is no answer that the restrictions enacted by it are justifiable under clauses (3) to (6). For, the scheme of Article 19 is to enumerate different freedoms separately and then to specify the extent of restrictions to which they may be subjected and the objects for securing which this could be done. A citizen is entitled to enjoy each and every one of the freedoms together and clause (1) does not prefer one freedom to another. That is the plain meaning of this clause. It follows from this that the State cannot make a law which directly restricts one freedom even for securing the better enjoyment of another freedom. All the greater reason,
- d therefore, for holding that the State cannot directly restrict one freedom by placing an otherwise permissible restriction on another freedom."

- e 25. Before we come to each of these expressions, we must understand what is meant by the expression "in the interests of". In *Supt. Central Prison v. Ram Manohar Lohia*<sup>15</sup>, this Court laid down: (SCR pp. 834-36 : AIR pp. 639-40, paras 12-14)

- f "... We do not understand the observations of the Chief Justice to mean that any remote or fanciful connection between the impugned Act and the public order would be sufficient to sustain its validity. The learned Chief Justice was only making a distinction between an Act which expressly and directly purported to maintain public order and one which did not expressly state the said purpose but left it to be implied therefrom; and between an Act that directly maintained public order and that indirectly brought about the same result. *The distinction does not ignore the necessity for intimate connection between the Act and the public order sought to be maintained by the Act.*

- g "... The restriction made 'in the interests of public order' must also have reasonable relation to the object to be achieved i.e. the public order. If the restriction has no proximate relationship to the achievement of public order, it cannot be said that the restriction is a reasonable restriction within the meaning of the said clause. ... The decision, in our view, lays down the correct test. The limitation imposed in the interests of public order to be a reasonable restriction, should be one which has a
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<sup>15</sup> (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Ch LJ 1002

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proximate connection or nexus with public order, but not one far-fetched, hypothetical or problematical or too remote in the chain of its relation with the public order.

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... There is no proximate or even foreseeable connection between such instigation and the public order sought to be protected under this section. We cannot accept the argument of the learned Advocate General that instigation of a single individual not to pay tax or dues is a spark which may in the long run ignite a revolutionary movement destroying public order."

(emphasis supplied) b

*Reasonable restrictions*

26. This Court has laid down what "reasonable restrictions" means in several cases. In *Chintaman Rao v. State of M.P.*<sup>16</sup> this Court said: (SCR p. 763 : AIR p. 119, para 7)

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

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27. In *State of Madras v. V.G. Row*<sup>17</sup>, this Court said: (SCR pp. 606-07 : AIR pp. 199-200, para 15)

"This Court had occasion in *Khare case*<sup>18</sup> to define the scope of the judicial review under clause (5) of Article 19 where the phrase 'imposing reasonable restrictions on the exercise of the right' also occurs and four out of the five Judges participating in the decision expressed the view (the other Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness; that is to say, the Court should consider not only factors such as the duration and the extent of the restrictions, but also the circumstances under which and the manner in which their imposition has been authorised. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent

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<sup>16</sup> 1950 SCR 759 : AIR 1951 SC 118

<sup>17</sup> 1952 SCR 597 : AIR 1952 SC 196 : 1952 Ch LJ 966

<sup>18</sup> *N.B. Khare v. State of Delhi*, 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Ch LJ 550

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a and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

c 28. Similarly, in *Mohd. Faruk v. State of M.P.*<sup>19</sup>, this Court said: (SCC p. 857, para 10 : SCR p. 161 E-G)

d "... The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom, the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public, the possibility of achieving the object by imposing a less drastic restraint, and in the absence of exceptional situations such as the prevalence of a state of emergency national or local—or the necessity to maintain essential supplies, or the necessity to stop activities inherently dangerous, the existence of a machinery to satisfy the administrative authority that no case for imposing the restriction is made out or that a less drastic restriction may ensure the object intended to be achieved."

f 29. In *N.B. Khare v. State of Delhi*<sup>18</sup>, a Constitution Bench also spoke of reasonable restrictions when it comes to procedure. It said: (SCR p. 524 : AIR p. 214, para 4)

g "... While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law. It is obvious that if the law prescribes five years' externment or ten years' externment, the question whether such period of externment is reasonable, being the substantive part, is necessarily for the consideration of the Court under clause (5). Similarly, if the law provides the procedure under which the exercise of the right may be restricted, the same is also for the consideration of the Court, as it

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19 (1969) 1 SCC 853 : (1970) 1 SCR 156  
18 1950 SCR 519 : AIR 1950 SC 211 : (1951) 52 Cr LJ 550

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has to determine if the exercise of the right has been reasonably restricted."

30. It was argued by the learned Additional Solicitor General that a relaxed standard of reasonableness of restriction should apply regard being had to the fact that the medium of speech being the internet differs from other mediums on several grounds. To appreciate the width and scope of his submissions, we are setting out his written submission verbatim:

"(i) The reach of print media is restricted to one State or at the most one country while internet has no boundaries and its reach is global;

(ii) The recipient of the free speech and expression used in a print media can only be literate persons while internet can be accessed by literate and illiterate both since one click is needed to download an objectionable post or a video;

(iii) In case of televisions serials (except live shows) and movies, there is a permitted pre-censorship which ensures right of viewers not to receive any information which is dangerous to or not in conformity with the social interest. While in the case of an internet, no such pre-censorship is possible and each individual is publisher, printer, producer, director and broadcaster of the content without any statutory regulation;

(iv) In case of print media or medium of television and films whatever is truly recorded can only be published or broadcasted/televised/viewed. While in case of an internet, morphing of images, change of voices and many other technologically advance methods to create serious potential social disorder can be applied.

(v) By the medium of internet, rumours having a serious potential of creating a serious social disorder can be spread to trillions of people without any check which is not possible in case of other mediums;

(vi) In case of mediums like print media, television and films, it is broadly not possible to invade privacy of unwilling persons. While in case of an internet, it is very easy to invade upon the privacy of any individual and thereby violating his right under Article 21 of the Constitution of India.

(vii) By its very nature, in the mediums like newspaper, magazine, television or a movie, it is not possible to sexually harass someone, outrage the modesty of anyone, use unacceptable filthy language and evoke communal frenzy which would lead to serious social disorder. While in the case of an internet, it is easily possible to do so by a mere click of a button without any geographical limitations and almost in all cases while ensuring anonymity of the offender.

(viii) By the very nature of the medium, the width and reach of internet is manifold as against newspaper and films. The said mediums have inbuilt limitations i.e. a person will have to buy/borrow a newspaper

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a and/or will have to go to a theatre to watch a movie. For television also one needs at least a room where a television is placed and can only watch those channels which he has subscribed and that too only at a time where it is being telecast. While in case of an internet a person abusing the internet, can commit an offence at any place at the time of his choice and maintaining his anonymity in almost all cases.

b (ix) In case of other mediums, it is impossible to maintain anonymity as a result of which speech/idea/opinions/films having serious potential of creating a social disorder never gets generated since its origin is bound to be known. While in case of an internet mostly its abuse takes place under the garb of anonymity which can be unveiled only after thorough investigation.

c (x) In case of other mediums like newspapers, television or films, the approach is always institutionalised approach governed by industry specific ethical norms of self conduct. Each newspaper/magazine/movie production house/TV channel will have its own institutionalised policies in-house which would generally obviate any possibility of the medium being abused. As against that use of internet is solely based upon individualistic approach of each individual without any check, balance or regulatory ethical norms for exercising freedom of speech and expression under Article 19(1)(a).

e (xi) In the era limited to print media and cinematograph; or even in case of publication through airwaves, the chances of abuse of freedom of expression was less due to inherent infrastructural and logistical constraints. In the case of said mediums, it was almost impossible for an individual to create and publish an abusive content and make it available to trillions of people. Whereas, in the present internet age the said infrastructural and logistical constraints have disappeared as any individual using even a smart mobile phone or a portable computer device can create and publish abusive material on its own, without seeking help of anyone else and make it available to trillions of people by just one click."

g 31. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved—that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Article 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a section creating a new offence, such as Section 69-A for instance, relatable only to speech over

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the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

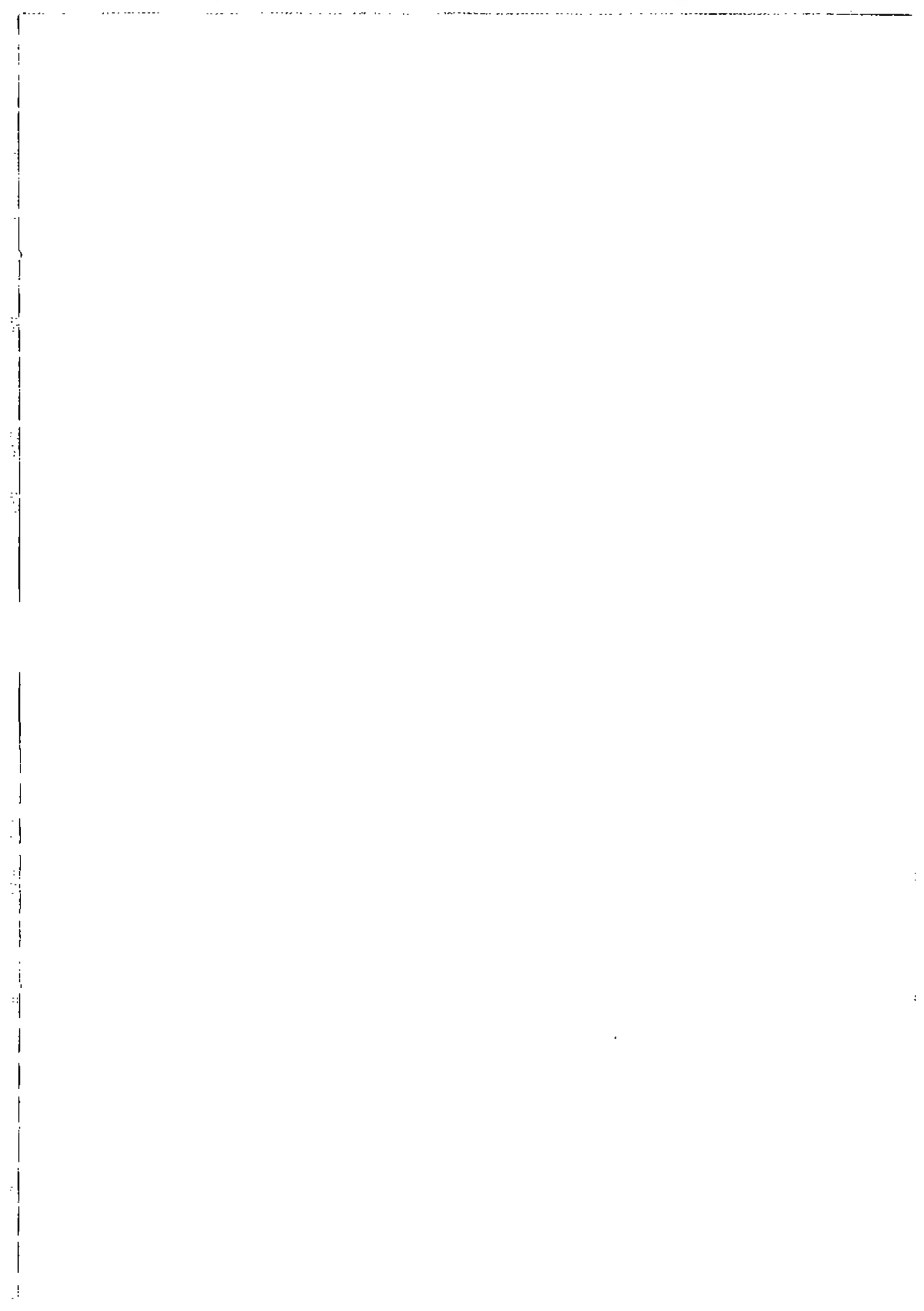
32. In fact, this aspect was considered in *Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal*<sup>20</sup> in para 37, where the following question was posed: (SCC p. 208)

"37. The next question which is required to be answered is whether there is any distinction between the freedom of the print media and that of the electronic media such as radio and television, and if so, whether it necessitates more restrictions on the latter media."

This question was answered in para 78 thus: (SCC pp. 226-27)

"78. There is no doubt that since the airwaves/frequencies are a public property and are also limited, they have to be used in the best interest of the society and this can be done either by a central authority by establishing its own broadcasting network or regulating the grant of licences to other agencies, including the private agencies. What is further, the electronic media is the most powerful media both because of its audio-visual impact and its widest reach covering the section of the society where the print media does not reach. The right to use the airwaves and the content of the programmes, therefore, needs regulation for balancing it and as well as to prevent monopoly of information and views relayed, which is a potential danger flowing from the concentration of the right to broadcast/telecast in the hands either of a central agency or of few private affluent broadcasters. That is why the need to have a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society. This is not disputed. But to contend that on that account the restrictions to be imposed on the right under Article 19(1)(a) should be in addition to those permissible under Article 19(2) and dictated by the use of public resources in the best interests of the society at large, is to misconceive both the content of the freedom of speech and expression and the problems posed by the element of public property in, and the alleged scarcity of, the frequencies as well as by the wider reach of the media. If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial. The virtues of the electronic media cannot become its enemies. It may warrant a greater regulation over licensing and control and vigilance on the content of the programme telecast. However, this control can only be exercised within the framework of Article 19(2) and the dictates of public interests. To plead for other grounds is to plead for unconstitutional measures. It is

<sup>20</sup> (1995) 2 SCC 161



- a further difficult to appreciate such contention on the part of the Government in this country when they have a complete control over the frequencies and the content of the programme to be telecast. They control the sole agency of telecasting. They are also armed with the provisions of Article 19(2) and the powers of pre-censorship under the Cinematograph Act and Rules. The only limitation on the said right is, therefore, the limitation of resources and the need to use them for the benefit of all. When, however, there are surplus or unlimited resources and the public interests so demand or in any case do not prevent telecasting, the validity of the argument based on limitation of resources disappears. It is true that to own a frequency for the purposes of broadcasting is a costly affair and even when there are surplus or unlimited frequencies, only the affluent few will own them and will be in a position to use it to subserve their own interest by manipulating news and views. That also poses a danger to the freedom of speech and expression of the have-nots by denying them the truthful information on all sides of an issue which is so necessary to form a sound view on any subject. That is why the doctrine of fairness has been evolved in the US in the context of the private broadcasters licensed to share the limited frequencies with the central agency like FCC to regulate the programming. But this phenomenon occurs even in the case of the print media of all the countries. Hence the body like the Press Council of India which is empowered to enforce, however imperfectly, the right to reply. The print media further enjoys as in our country, freedom from pre-censorship unlike the electronic media." (emphasis supplied)

*Public order*

- e 33. In Article 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made under Section 7 of the Punjab Maintenance of Public Order Act and to an order made under Section 9(1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments by this Court. Thus, in *Romesh Thappar v. State of Madras*<sup>2</sup>, this Court held that an order made under Section 9(1)(a) of the Madras Maintenance of Public Order Act (23 of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

g 34. Similarly, in *Brij Bhushan v. State of Delhi*<sup>21</sup>, an order made under Section 7 of the East Punjab Public Safety Act, 1949, was held to be unconstitutional and void for the self-same reason.

- h 2 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cri LJ 1514  
21 1950 SCR 605 : AIR 1950 SC 129 : (1950) 51 Cri LJ 1525



35. As an aftermath of these judgments, the Constitution First Amendment added the words "public order" to Article 19(2).

36. In *Supt., Central Prison v. Ram Manohar Lohia*<sup>15</sup>, this Court held that public order is synonymous with public safety and tranquility; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State. This definition was further refined in *Ram Manohar Lohia v. State of Bihar*<sup>22</sup>, where this Court held: (SCR p. 746 D-E : AIR pp. 758-59, para 52)

"It will thus appear that just as 'public order' in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting 'security of State', 'law and order' also comprehends disorders of less gravity than those affecting 'public order'. One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."

37. In *Arun Ghosh v. State of W.B.*<sup>23</sup>, *Ram Manohar Lohia case*<sup>22</sup> was referred to with approval in the following terms: (SCC pp. 99-100, para 3 : SCR pp. 290-91)

"... In *Ram Manohar Lohia case*<sup>22</sup> this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardised because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take

15 (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cr LJ 1002

22 (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cr LJ 608

23 (1970) 1 SCC 98 : 1970 SCC (Cr) 67 : (1970) 3 SCR 288

- a the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. *He may annoy them and also the management but he does not cause disturbance of public order.* He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquillity there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as *ordre publique*. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in *Pushkar Mukherjee v. State of W.B.*<sup>24</sup> drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In *Ram Manohar Lohia case*<sup>22</sup> examples were given by Sarkar, and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another." (emphasis supplied)
- b
- c
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38. This decision lays down the test that has to be formulated in all these cases. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an

h  
24 (1969) 1 SCC 10

22 *Ram Manohar Lohia v. State of Bihar*, (1966) 1 SCR 709 : AIR 1966 SC 740 : 1966 Cri LJ 608

individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66-A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66-A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this section is concerned. (Save and except where under sub-clause (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals. The section makes no distinction between mass dissemination and dissemination to one person. Further, the section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent—there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquillity. On all these counts, it is clear that the section has no proximate relationship to public order whatsoever. The example of a guest at a hotel “annoying” girls is telling—this Court has held that mere “annoyance” need not cause disturbance of public order. Under Section 66-A, the offence is complete by sending a message for the purpose of causing annoyance, either “persistently” or otherwise without in any manner impacting public order.

*Clear and present danger — Tendency to affect*

39. It will be remembered that Holmes, J. in *Schenck v. United States*<sup>25</sup>, enunciated the clear and present danger test as follows: (L Ed pp. 473-74)

“... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck's Stove & Range Co.*<sup>26</sup>, US p. 439. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”

40. This was further refined in *Abrams v. United States*<sup>27</sup>, this time in a Holmesian dissent, to be clear and imminent danger. However, in most of the subsequent judgments of the US Supreme Court, the test has been understood to mean to be “clear and present danger”. The test of “clear and present danger” has been used by the US Supreme Court in many varying situations and has been adjusted according to varying fact situations. It appears to have been repeatedly applied, see *Terminiello v. Chicago*<sup>27</sup>, L Ed at pp. 1134-35,

<sup>25</sup> 63 L Ed 470 : 249 US 47 (1919)

<sup>26</sup> 221 US 418 : 31 S Ct 492 : 55 L Ed 797 : 34 LRA (NS) 874 (1911)

<sup>27</sup> 250 US 616 : 63 L Ed 1173 (1919)

<sup>27</sup> 93 L Ed 1131 : 337 US 1 (1949)

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*Brandenburg v. Ohio*<sup>28</sup>, 3 L Ed 2d at pp. 434-35 & 436, *Virginia v. Black*<sup>29</sup>, 5 L Ed 2d at pp. 551, 552 and 553<sup>30</sup>.

- a 41. We have echoes of it in our law as well—*S. Rangarajan v. P. Jagjivan Ram*<sup>31</sup>, SCC at para 45: (SCC pp. 595-96)

"45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. *Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered.* The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a power keg'." (emphasis supplied)

- d 42. This Court has used the expression "tendency" to a particular act. Thus, in *State of Bihar v. Shailabala Devi*<sup>32</sup>, an early decision of this Court said that an article, in order to be banned must have a tendency to excite persons to acts of violence (SCR at pp. 662-63). The test laid down in the

28 23 L Ed 2d 430 : 395 US 444 (1969)

29 155 L Ed 2d 535 : 538 US 343 (2003)

- e 30 In its present form the clear and present danger test has been reformulated to say that:

"The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

- f Interestingly, the US Courts have gone on to make a further refinement. The State may ban what is called a "true threat".

" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

- g "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

- h [See *Virginia v. Black*, 155 L Ed 2d 535 : 538 US 343 (2003) and *Watts v. United States*, 22 L Ed 2d 664 at p. 667 : 394 US 705 (1969)]

31 (1989) 2 SCC 574

32 1952 SCR 654 : AIR 1952 SC 329 : 1952 Cr LJ 1373



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said decision was that the article should be considered as a whole in a fair free liberal spirit and then it must be decided what effect it would have on the mind of a reasonable reader (SCR at pp. 664-65).

43. In *Ramji Lal Modi v. State of U.P.*<sup>33</sup>, SCR at p. 867, this Court upheld Section 295-A of the Penal Code only because it was read down to mean that aggravated forms of insults to religion must have a tendency to disrupt public order. Similarly, in *Kedar Nath Singh v. State of Bihar*<sup>34</sup>, Section 124-A of the Penal Code, 1860 was upheld by construing it narrowly and stating that the offence would only be complete if the words complained of have a tendency of creating public disorder by violence. It was added that merely creating disaffection or *creating feelings of enmity* in certain people was not good enough or else it would violate the fundamental right of free speech under Article 19(1)(a). Again, in *Ramesh Yeshwant Prabhoo v. Prabhakar Kashinath Kunte*<sup>35</sup>, Section 123(3-A) of the Representation of the People Act was upheld only if the enmity or hatred that was spoken about in the section would tend to create immediate public disorder and not otherwise.

44. Viewed at, either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66-A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

#### Defamation

45. "Defamation" is defined in Section 499 of the Penal Code as follows:

"499. *Defamation*.—Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

*Explanation 1*.—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

*Explanation 2*.—It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

*Explanation 3*.—An imputation in the form of an alternative or expressed ironically, may amount to defamation.

*Explanation 4*.—No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

33 1957 SCR 860 : AIR 1957 SC 620 : 1957 Cri LJ 1006

34 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103

35 (1996) 1 SCC 130

46. It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66-A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear, therefore, that the section is not aimed at defamatory statements at all.

*Incitement to an offence*

47. Equally, Section 66-A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger, etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66-A has nothing to do with "incitement to an offence". As Section 66-A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject-matters under Article 19(2) must, therefore, fall foul of Article 19(1)(a), and not being saved under Article 19(2), is declared as unconstitutional.

*Decency or morality*

48. This Court in *Ranjit D. Udeshi v. State of Maharashtra*<sup>36</sup> took a rather restrictive view of what would pass muster as not being obscene. The Court followed the test laid down in the old English judgment in *Hicklin case*<sup>37</sup> which was whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. Great strides have been made since this decision in the U.K., the United States as well as in our country. Thus, in *Directorate General of Doordarshan v. Anand Patwardhan*<sup>38</sup> this Court noticed the law in the United States and said that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject-matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, educational or scientific value (see para 31).

49. In a recent judgment of this Court, *Aveek Sarkar v. State of W.B.*<sup>39</sup>, this Court referred to English, US and Canadian judgments and moved away from the *Hicklin*<sup>37</sup> test and applied the contemporary community standards test.

<sup>36</sup> (1965) 1 SCR 65 : AIR 1965 SC 881 : (1965) 2 Cr LJ 8

<sup>37</sup> *R. v. Hicklin*, (1868) LR 3 QB 360

<sup>38</sup> (2006) 8 SCC 433

<sup>39</sup> (2014) 4 SCC 257 : (2014) 2 SCC (Cr) 291

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50. What has been said with regard to public order and incitement to an offence equally applies here. Section 66-A cannot possibly be said to create an offence which falls within the expression "decency" or "morality" in that what may be grossly offensive or annoying under the section need not be obscene at all—in fact the word "obscene" is conspicuous by its absence in Section 66-A. a

51. However, the learned Additional Solicitor General asked us to read into Section 66-A each of the subject-matters contained in Article 19(2) in order to save the constitutionality of the provision. We are afraid that such an exercise is not possible for the simple reason that when the legislature intended to do so, it provided for some of the subject-matters contained in Article 19(2) in Section 69-A. We would be doing complete violence to the language of Section 66-A if we were to read into it something that was never intended to be read into it. Further, he argued that the statute should be made workable, and the following should be read into Section 66-A: b

"(i) Information which would appear highly abusive, insulting, pejorative, offensive by reasonable person in general, judged by the standards of an open and just multi-caste, multi-religious, multi-racial society; c

— *Director of Public Prosecutions v. Collins*<sup>40</sup>, WLR paras 9 and 21 d

— *Connolly v. Director of Public Prosecutions*<sup>41</sup>

— House of Lords Select Committee 1st Report of Session 2014-2015 on Communications titled as "Social Media And Criminal Offences" at p. 260 of Compilation of Judgments, Vol. 1, Part B

(ii) Information which is directed to incite or can produce imminent lawless action; e

(*Brandenburg v. Ohio*<sup>28</sup>)

(iii) Information which may constitute credible threats of violence to the person or damage;

(iv) Information which stirs the public to anger, invites violent disputes brings about condition of violent unrest and disturbances; f

(*Terminiello v. Chicago*<sup>27</sup>)

(v) Information which advocates or teaches the duty, necessity or propriety of violence as a means of accomplishing political, social or religious reform and/or justifies commissioning of violent acts with an intent to exemplify or glorify such violent means to accomplish political, social, economical or religious reforms; g

(*Whiney v. California*<sup>8</sup>)

40 (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL)

41 (2008) 1 WLR 276 : (2007) 2 All ER 1012

28 23 L. Ed 2d 430 : 395 US 444 (1969)

27 93 L. Ed 1131 : 337 US 1 (1949)

8 71 L. Ed 1095 : 274 US 357 (1927) h



(vi) Information which contains fighting or abusive material;  
*Chaplinsky v. New Hampshire*<sup>10</sup>

- a (vii) Information which promotes hate speech i.e.
  - (a) Information which propagates hatred towards individual or a group, on the basis of race, religion, religion, casteism, ethnicity.
  - (b) Information which is intended to show the supremacy of one particular religion/race/caste by making disparaging, abusive and/or highly inflammatory remarks against religion/race/caste.
- b (c) Information depicting religious deities, holy persons, holy symbols, holy books which are created to insult or to show contempt or lack of reverence for such religious deities, holy persons, holy symbols, holy books or towards something which is considered sacred or inviolable.
- c (viii) Satirical or iconoclastic cartoon and caricature which fails the test laid down in *Hustler Magazine Inc. v. Falwell*<sup>12</sup>;
  - (ix) Information which glorifies terrorism and use of drugs;
  - (x) Information which infringes right of privacy of the others and includes acts of cyber bullying, harassment or stalking;
- d (xi) Information which is obscene and has the tendency to arouse feeling or revealing an overt sexual desire and should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it;  
(*Aveek Sarkar v. State of W.B.*<sup>39</sup>)
- e (xii) Context and background test of obscenity. Information which is posted in such a context or background which has a consequential effect of outraging the modesty of the pictured individual.  
(*Aveek Sarkar v. State of W.B.*<sup>39</sup>)

52. What the learned Additional Solicitor General is asking us to do is not to read down Section 66-A—he is asking for a wholesale substitution of the provision which is obviously not possible.

f *Vagueness*

53. Counsel for the petitioners argued that the language used in Section 66-A is so vague that neither would an accused person be put on notice as to what exactly is the offence which has been committed nor would the authorities administering the section be clear as to on which side of a clearly drawn line a particular communication will fall.

h 10 86 L Ed 1031 : 315 US 568 (1942)  
42 485 US 46 : 99 L Ed 2d 41 (1988)  
39 (2014) 4 SCC 257 : (2014) 2 SCC (Cr) 291

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54. We were given *Collin's Dictionary*, which defined most of the terms used in Section 66-A, as follows:

"Offensive.—

- (1) unpleasant or disgusting, as to the senses
- (2) causing anger or annoyance; insulting
- (3) for the purpose of attack rather than defence.

a

Menace.—

- (1) to threaten with violence, danger, etc.
- (2) a threat of the act of threatening
- (3) something menacing; a source of danger
- (4) a nuisance.

b

Annoy.—

- (1) to irritate or displease
- (2) to harass with repeated attacks.

c

Annoyance.—

- (1) the feeling of being annoyed
- (2) the act of annoying.

Inconvenience.—

- (1) the state of quality of being inconvenient
- (2) something inconvenient; a hindrance, trouble, or difficulty.

d

Danger.—

- (1) the state of being vulnerable to injury, loss, or evil; risk
- (2) a person or a thing that may cause injury, pain, etc.

Obstruct.—

- (1) to block (a road, a passageway, etc.) with an obstacle
- (2) to make (progress or activity) difficult
- (3) to impede or block a clear view of.

e

Obstruction.—a person or a thing that obstructs.

Insult.—

- (1) to treat, mention, or speak to rudely; offend; affront
- (2) to assault; attack
- (3) an offensive or contemptuous remark or action; affront; slight
- (4) a person or thing producing the effect of an affront ⇒ some television is an insult to intelligence
- (5) an injury or trauma."

f

55. The US Supreme Court has repeatedly held in a series of judgments that where no reasonable standards are laid down to define guilt in a section which creates an offence, and where no clear guidance is given to either law abiding citizens or to authorities and courts, a section which creates an offence and which is vague must be struck down as being arbitrary and unreasonable. Thus, in *Musser v. Utah*<sup>43</sup>, a Utah statute which outlawed conspiracy to commit acts injurious to public morals was struck down.

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h

43 92 L Ed 562 : 68 S Ct 397 : 333 US 95 (1948)

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56. In *Winters v. New York*<sup>44</sup>, a New York penal law read as follows: (L Ed p. 846)

- a "1141. *Obscene prints and articles*.—(1) A person ... who,  
(2) Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime;

\* \* \*

Is guilty of a misdemeanor...."

The Court in striking down the said statute held: (L Ed pp. 851-52)

- c "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court. The legislative bodies in  
d draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character 'that men of common intelligence must necessarily guess at its meaning'. *Connally v. General Construction Co.*<sup>45</sup>, US p. 391 : S Ct p. 127. The entire text of the statute or the subjects dealt with may furnish an  
e adequate standard. The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities.

- f The sub-section of the New York Penal Law, as now interpreted by the Court of Appeals prohibits distribution of a magazine principally made up of criminal news or stories of deeds of bloodshed, or lust, so massed as to become vehicles for inciting violent and depraved crimes against the person. But even considering the gloss put upon the literal meaning by the Court of Appeals' restriction of the statute to collections of stories 'so massed as to become vehicles for inciting violent and depraved crimes against the person ... not necessarily ... sexual passion',  
g we find the specification of publications, prohibited from distribution, too uncertain and indefinite to justify the conviction of this petitioner. Even though all detective tales and treatises on criminology are not forbidden, and though publications made up of criminal deeds not characterised by bloodshed or lust are omitted from the interpretation of the Court of Appeals, we think fair use of collections of pictures and

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<sup>44</sup> 92 L Ed 840 : 333 US 507 (1948)

<sup>45</sup> 269 US 385 : 46 S Ct 126 : 70 L Ed 322 (1926)

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stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between the allowable and the forbidden publications. No intent or purpose is required—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough. The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person. No conspiracy to commit a crime is required. See *Musser v. Utah*, this term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the article of the Penal Law under which it appears. As said in *Cohen Grocery Co. case*<sup>46</sup>, (US at p. 89 : S Ct at p. 300): (L Ed p. 520)

... It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.

The statute as construed by the Court of Appeals does not limit punishment to the indecent and obscene, as formerly understood. When stories of deeds of bloodshed, such as many in the accused magazines, are massed so as to incite to violent crimes, the statute is violated. It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable, might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes'. Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. *Herndon v. Lowry*<sup>47</sup>, US p. 259 : S Ct p. 739."

57. In *Burstyn v. Wilson*<sup>48</sup>, sacrilegious writings and utterances were outlawed. Here again, the US Supreme Court stepped in to strike down the offending section stating: (L Ed p. 1121)

... It is not a sufficient answer to say that 'sacrilegious' is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York. To allow such vague, undefinable powers of censorship to be exercised is bound to have stultifying consequences on the creative process of literature and art—for the films are derived largely from literature. History does not encourage reliance on the wisdom and moderation of the censor as a safeguard in the exercise of such drastic power over the minds of men. We not only do not know but cannot know what is condemnable by 'sacrilegious'. And if we cannot tell, how are those to be governed by the statute to tell?"

<sup>46</sup> *United States v. L. Cohen Grocery Co.*, 255 US 81 : 41 S Ct 298 : 65 L Ed 516 : 14 ALR 1015 (1921)

<sup>47</sup> 301 US 242 : 57 S Ct 732 : 81 L Ed 1066 (1937)

<sup>48</sup> 361 L Ed 1098 : 343 US 495 (1952)

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58. In *Chicago v. Morales*<sup>49</sup>, a Chicago Gang Congregation Ordinance prohibited criminal street gang members from loitering with one another or with other persons in any public place for no apparent purpose. The Court referred to an earlier judgment in *United States v. Reese*<sup>50</sup>, US at p. 221 in which it was stated that *the Constitution does not permit a legislature to set a net large enough to catch all possible offenders and leave it to the Court to step in and say who could be rightfully detained and who should be set at liberty*. It was held that the broad sweep of the Ordinance violated the requirement that a legislature needs to meet: to establish minimum guidelines to govern law enforcement. As the impugned Ordinance did not have any such guidelines, a substantial amount of innocent conduct would also be brought within its net, leading to its unconstitutionality.

59. It was further held that a penal law is void for vagueness if it fails to define the criminal offence with sufficient definiteness. Ordinary people should be able to understand what conduct is prohibited and what is permitted. Also, those who administer the law must know what offence has been committed so that arbitrary and discriminatory enforcement of the law does not take place.

60. Similarly, in *Grayned v. Rockford*<sup>51</sup>, the State of Illinois provided in an anti-noise Ordinance as follows: (L Ed p. 227)

- "[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof...." Code of Ordinances, c 28, § 19.2(a)."

- The law on the subject of vagueness was clearly stated thus: (*Grayned case*<sup>51</sup>, L Ed pp. 227-28)

- "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, Judges, and Juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms'. Uncertain meanings inevitably lead citizens to 'steer far wider of the

<sup>49</sup> 527 US 41 : 144 L Ed 2d 67 (1999)  
<sup>50</sup> 92 US 214 : 23 L Ed 563 (1876)  
<sup>51</sup> 33 L Ed 2d 222 : 408 US 104 (1972)

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unlawful zone" ... than if the boundaries of the forbidden areas were clearly marked."

61. The anti-noise Ordinance was upheld on facts in that case because it fixed the time at which noise disrupts school activity—while the school is in session—and at a fixed place—"adjacent" to the school. a

62. Secondly, there had to be demonstrated a causality between disturbance that occurs and the noise or diversion. Thirdly, acts have to be wilfully done. *It is important to notice that the Supreme Court specifically held that "undesirables" or their "annoying conduct" may not be punished.* b  
It is only on these limited grounds that the said Ordinance was considered not to be impermissibly vague.

63. In *Reno v. American Civil Liberties Union*<sup>52</sup>, two provisions of the Communications Decency Act, 1996 which sought to protect minors from harmful material on the internet were adjudged unconstitutional. This judgment is a little important for two basic reasons—that it deals with a penal offence created for persons who use the internet as also for the reason that the statute which was adjudged unconstitutional uses the expression "patently offensive" which comes extremely close to the expression "grossly offensive" used by the impugned Section 66-A. Section 223(d), which was adjudged unconstitutional, is set out hereinbelow: (US p. 860) c

"223. (d) Whoever— d

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, 'any comment, request, suggestion, proposal, image, or other communication, that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or e

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by para (1) with the intent that it be used for such activity, f

shall be fined under Title 18, or imprisoned not more than two years, or both."

Interestingly, the District Court Judge writing of the internet said:

"[I]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—as yet seen. The plaintiffs in these actions correctly describe the 'democratizing' effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and anti-federalists may debate the structure of their government nightly, but g

<sup>52</sup> 521 US 844 : 138 L. Ed 2d 874 (1997) h

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a these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen." *American Civil Liberties Union v. Reno*<sup>53</sup>, F Supp at p. 881. (at p. 425)

b 64. The Supreme Court held that the impugned statute lacked the precision that the First Amendment required when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the impugned Act effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.

c 65. Such a burden on adult speech is unacceptable if less restrictive alternatives would be as effective in achieving the legitimate purpose that the statute was enacted to serve. *It was held that the general undefined term "patently offensive" covers large amounts of non-pornographic material with serious educational or other value and was both vague and over broad.* It was, thus, held that the impugned statute was not narrowly tailored and would fall foul of the first amendment.

d 66. In *Federal Communications Commission v. Fox Television Stations Inc.*<sup>54</sup>, it was held: (S Ct p. 2317)

e "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Construction Co.*<sup>45</sup>, US 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville*<sup>55</sup>, US 162 ["Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" [quoting *Lanzetta v. New Jersey*<sup>56</sup>, US 453 (alteration in original)]]. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v. Williams*<sup>57</sup>, US 304. It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained,

53 929 F Supp 824 (3d Cir 1996)

54 132 S Ct 2307 : 183 L Ed 2d 234 (2012)

45 *Connally v. General Construction Co.*, 269 US 385 : 46 S Ct 126 : 70 L Ed 322 (1926)

h 55 405 US 156 : 31 L Ed 2d 110 (1972)

56 306 US 451 : 83 L Ed 888 (1939)

57 553 US 285 : 170 L Ed 2d 650 (2008)

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a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. Rockford*<sup>51</sup>, US 108-109. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”

67. Coming to this Court's judgments, in *State of M.P. v. Baldeo Prasad*<sup>58</sup>, an inclusive definition of the word “goonda” was held to be vague and the offence created by Section 4-A of the Goondas Act was, therefore, violative of Articles 19(1)(d) and (e) of the Constitution. It was stated: (SCR pp. 979-80 : AIR pp. 297-98, paras 9-10)

“Incidentally it would also be relevant to point out that the definition of the word ‘goonda’ affords no assistance in deciding which citizen can be put under that category. It is an inclusive definition and it does not indicate which tests have to be applied in deciding whether a person falls in the first part of the definition. Recourse to the dictionary meaning of the word would hardly be of any assistance in this matter. After all it must be borne in mind that the Act authorises the District Magistrate to deprive a citizen of his fundamental right under Articles 19(1)(d) and (e), and though the object of the Act and its purpose would undoubtedly attract the provisions of Article 19(5) care must always be taken in passing such Acts that they provide sufficient safeguards against casual, capricious or even malicious exercise of the powers conferred by them. It is well known that the relevant provisions of the Act are initially put in motion against a person at a lower level than the District Magistrate, and so it is always necessary that sufficient safeguards should be provided by the Act to protect the fundamental rights of innocent citizens and to save them from unnecessary harassment. That is why we think the definition of the word ‘goonda’ should have given necessary assistance to the District Magistrate in deciding whether a particular citizen falls under the category of goonda or not; that is another infirmity in the Act. As we have already pointed out Section 4-A suffers from the same infirmities as Section 4.

Having regard to the two infirmities in Sections 4, 4-A respectively we do not think it would be possible to accede to the argument of the learned Advocate General that the operative portion of the Act can fall under Article 19(5) of the Constitution. The person against whom action can be taken under the Act is not entitled to know the source of the

<sup>51</sup> 33 L. Ed 2d 222 : 408 US 104 (1972)

<sup>58</sup> (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cr LJ 442



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- a information received by the District Magistrate; he is only told about his prejudicial activities on which the satisfaction of the District Magistrate is based that action should be taken against him under Section 4 or Section 4-A. In such a case it is absolutely essential that the Act must clearly indicate by a proper definition or otherwise when and under what circumstances a person can be called a goonda, and it must impose an obligation on the District Magistrate to apply his mind to the question as to whether the person against whom complaints are received is such a goonda or not. It has been urged before us that such an obligation is implicit in Sections 4 and 4-A. We are, however, not impressed by this argument. Where a statute empowers the specified authorities to take preventive action against the citizens it is essential that it should expressly make it a part of the duty of the said authorities to satisfy themselves about the existence of what the statute regards as conditions precedent to the exercise of the said authority. If the statute is silent in respect of one of such conditions precedent it undoubtedly constitutes a serious infirmity which would inevitably take it out of the provisions of Article 19(5). The result of this infirmity is that it has left to the unguided and unfettered discretion of the authority concerned to treat any citizen as a goonda. In other words, the restrictions which it allows to be imposed on the exercise of the fundamental right of a citizen guaranteed by Articles 19(1)(d) and (e) must in the circumstances be held to be unreasonable. That is the view taken by the High court and we see no reason to differ from it."

e 68. At one time this Court seemed to suggest that the doctrine of vagueness was no part of the Constitutional Law of India. That was dispelled in no uncertain terms in *K.A. Abbas v. Union of India*<sup>59</sup>: (SCC pp. 798-99 paras 44-46 : SCR pp. 469-71)

f '44. This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on *Municipal Committee, Amritsar v. State of Punjab*<sup>60</sup>. In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid on the ground that it violates the due process clause or that it is vague. ...

g These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the

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59 (1970) 2 SCC 780 : (1971) 2 SCR 446  
60 (1969) 1 SCC 475

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nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in *State of M.P. v. Baldeo Prasad*<sup>58</sup>, where the Central Provinces and Berar Goondas Act, 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4-A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore held to be uncertain and vague. a  
b

The real rule is that if a law is vague or appears to be so, the court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. *Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual.* If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases." (emphasis supplied) c  
d

69. Similarly, in *Harakchand Ratanchand Banthia v. Union of India*<sup>61</sup>, Section 27 of the Gold Control Act was struck down on the ground that the conditions imposed by it for the grant of renewal of licences are uncertain, vague and unintelligible. The Court held: (SCC p. 183, para 21) e

"21. We now come to Section 27 of the Act which relates to licensing of dealers. It was stated on behalf of the petitioners that the conditions imposed by sub-section (6) of Section 27 for the grant or renewal of licences are uncertain, vague and unintelligible and consequently wide and unfettered power was conferred upon the statutory authorities in the matter of grant or renewal of licence. In our opinion this contention is well founded and must be accepted as correct. Section 27(6)(a) states that in the matter of issue or renewal of licences the administrator shall have regard to 'the number of dealers existing in the region in which the applicant intends to carry on business as a dealer'. But the word 'region' is nowhere defined in the Act. Similarly Section 27(6)(b) requires the Administrator to have regard to 'the anticipated demand, as estimated by him, for ornaments in that region'. The expression 'anticipated demand' is a vague expression which is not capable of objective assessment and is f  
g

58 (1961) 1 SCR 970 : AIR 1961 SC 293 : (1961) 1 Cri LJ 442  
61 (1969) 2 SCC 166 h

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- a bound to lead to a great deal of uncertainty. Similarly the expression 'suitability of the applicant' in Section 27(6)(e) and 'public interest' in Section 27(6)(g) do not provide any objective standard or norm or guidance. For these reasons it must be held that clauses (a), (d), (e) and (g) of Section 27(6) impose unreasonable restrictions on the fundamental right of the petitioner to carry on business and are constitutionally invalid. It was also contended that there was no reason why the conditions for renewal of licence should be as rigorous as the conditions for initial grant of licence. The requirement of strict conditions for the renewal of licence renders the entire future of the business of the dealer uncertain and subjects it to the caprice and arbitrary will of the administrative authorities. There is justification for this argument and the requirement of Section 26 of the Act imposing the same conditions for the renewal of the licence as for the initial grant appears to be unreasonable. In our opinion clauses (a), (b), (e) and (g) are inextricably bound up with the other clauses of Section 27(6) and form part of a single scheme. The result is that clauses (a), (b), (c), (e) and (g) are not severable and the entire Section 27(6) of the Act must be held invalid. Section 27(2)(d) of the Act states that a valid licence issued by the administrator 'may contain such conditions, limitations and restrictions as the administrator may think fit to impose and different conditions, limitations and restrictions may be imposed for different classes of dealers'. On the face of it, this sub-section confers such wide and vague power upon the administrator that it is difficult to limit its scope. In our opinion Section 27(2)(d) of the Act must be struck down as an unreasonable restriction on the fundamental right of the petitioners to carry on business. It appears, however, to us that if Section 27(2)(d) and Section 27(6) of the Act are invalid the licensing scheme contemplated by the rest of Section 27 of the Act cannot be worked in practice. It is, therefore, necessary for Parliament to enact fresh legislation imposing appropriate conditions and restrictions for the grant and renewal of licences to dealers. In the alternative the Central Government may make appropriate rules for the same purpose in exercise of its rule-making power under Section 114 of the Act."
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70. In *A.K. Roy v. Union of India*<sup>62</sup>, a part of Section 3 of the National Security Ordinance was read down on the ground that "acting in any manner prejudicial to the maintenance of supplies and services essential to the community" is an expression so vague that it is capable of wanton abuse. The Court held: (SCC pp. 318-19, paras 64-65 : SCR pp. 325-26)
- g

- "What we have said above in regard to the expressions 'defence of India', 'security of India', 'security of the State' and 'relations of India with foreign powers' cannot apply to the expression 'acting in any manner prejudicial to the maintenance of supplies and services essential to the community' which occurs in Section 3(2) of the Act. Which
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62 (1982) 1 SCC 271 : 1982 SCC (Cr) 152 : (1982) 2 SCR 272

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supplies and services are essential to the community can easily be defined by the legislature and indeed, legislations which regulate the prices and possession of essential commodities either enumerate those commodities or confer upon the appropriate Government the power to do so. In the absence of a definition of 'supplies and services essential to the community', the detaining authority will be free to extend the application of this clause of sub-section (2) to any commodities or services the maintenance of supply of which, according to him, is essential to the community.

But that is not all. The Explanation to sub-section (2) gives to the particular phrase in that sub-section a meaning which is not only uncertain but which, at any given point of time, will be difficult to ascertain or fasten upon. According to the Explanation, no order of detention can be made under the National Security Act on any ground on which an order of detention may be made under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980. The reason for this, which is stated in the Explanation itself, is that for the purposes of sub-section (2), 'acting in any manner prejudicial to the maintenance of supplies essential to the community' does not include 'acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community' as defined in the Explanation to sub-section (1) of Section 3 of the 1980 Act. Clauses (a) and (b) of the Explanation to Section 3(1) of the 1980 Act exhaust almost the entire range of essential commodities. Clause (a) relates to committing or instigating any person to commit any offence punishable under the Essential Commodities Act, 10 of 1955, or under any other law for the time being in force relating to the control of the production, supply or distribution of, or trade and commerce in, any commodity essential to the community. Clause (b) of the Explanation to Section 3(1) of the 1980 Act relates to dealing in any commodity which is an essential commodity as defined in the Essential Commodities Act, 1955, or with respect to which provisions have been made in any such other law as is referred to in clause (a). We find it quite difficult to understand as to which are the remaining commodities outside the scope of the 1980 Act, in respect of which it can be said that the maintenance of their supplies is essential to the community. The particular clause in sub-section (2) of Section 3 of the National Security Act is, therefore, capable of wanton abuse in that, the detaining authority can place under detention any person for possession of any commodity on the basis that the authority is of the opinion that the maintenance of supply of that commodity is essential to the community. We consider the particular clause not only vague and uncertain but, in the context of the Explanation, capable of being extended cavalierly to supplies, the maintenance of which is not essential to the community. To allow the personal liberty of the people to be taken away by the application of that clause would be a flagrant violation of the fairness and justness of procedure which is implicit in the provisions of Article 21."

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71. Similarly, in *Kartar Singh v. State of Punjab*<sup>63</sup>, SCC at paras 130-31, it was held: (SCC pp. 648-49)

- a "130. It is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Such a law impermissibly delegates basic policy matters to policemen and also judges for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. More so uncertain and undefined words deployed inevitably lead citizens to 'steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.
- b
- c 131. Let us examine clause (i) of Section 2(1)(a). This section is shown to be blissfully and impermissibly vague and imprecise. As rightly pointed out by the learned counsel, even an innocent person who ingenuously and undefiledly communicates or associates without any knowledge or having no reason to believe or suspect that the person or class of persons with whom he has communicated or associated is engaged in assisting in any manner terrorists or disruptionists, can be arrested and prosecuted by abusing or misusing or misapplying this definition. In ultimate consummation of the proceedings, perhaps that guiltless and innoxious innocent person may also be convicted."
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72. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in Section 66-A are completely open-ended and undefined. Section 66 in stark contrast to Section 66-A states:

- e "66. *Computer related offences*.—If any person, dishonestly or fraudulently, does any act referred to in Section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

*Explanation*.—For the purposes of this section—

- f (a) the word 'dishonestly' shall have the meaning assigned to it in Section 24 of the Indian Penal Code (45 of 1860);
- g (b) the word 'fraudulently' shall have the meaning assigned to it in Section 25 of the Indian Penal Code (45 of 1860)."

73. It will be clear that in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expressions "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66-A.

74. The provisions contained in Sections 66-B up to 67-B also provide for various punishments for offences that are clearly made out. For example, under Section 66-B, whoever dishonestly receives or retains any stolen computer resource or communication device is punished with imprisonment. Under Section 66-C, whoever fraudulently or dishonestly makes use of any

63 (1994) 3 SCC 569 : 1994 SCC (Cr) 899

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identification feature of another person is liable to punishment with imprisonment. Under Section 66-D, whoever cheats by personating becomes liable to punishment with imprisonment. Section 66-F again is a narrowly drawn section which inflicts punishment which may extend to imprisonment for life for persons who threaten the unity, integrity, security or sovereignty of India. Sections 67 to 67-B deal with punishment for offences for publishing or transmitting obscene material including depicting children in sexually explicit acts in electronic form. a

75. In the Penal Code, 1860 a number of the expressions that occur in Section 66-A occur in Section 268. b

"268. *Public nuisance*.—A person is guilty of a public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. c

A common nuisance is not excused on the ground that it causes some convenience or advantage."

76. It is important to notice the distinction between Sections 268 and 66-A. Whereas, in Section 268 the various expressions used are ingredients for the offence of a public nuisance, these ingredients now become offences in themselves when it comes to Section 66-A. Further, under Section 268, the person should be guilty of an act or omission which is illegal in nature—legal acts are not within its net. A further ingredient is that injury, danger or annoyance must be to the public in general. Injury, danger or annoyance are not offences by themselves howsoever made and to whomsoever made. The expression "annoyance" appears also in Sections 294 and 510 IPC. d

"294. *Obscene acts and songs*.—Whoever, to the annoyance of others, e

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene songs, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both. f

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510. *Misconduct in public by a drunken person*.—Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten rupees, or with both. g

77. If one looks at Section 294 IPC, the annoyance that is spoken of is clearly defined—that is, it has to be caused by obscene utterances or acts. Equally, under Section 510, the annoyance that is caused to a person must only be by another person who is in a state of intoxication and who annoys such person only in a public place or in a place for which it is a trespass for him to enter. Such narrowly and closely defined contours of offences made out under the Penal Code are conspicuous by their absence in Section 66-A h

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which in stark contrast uses completely open-ended, undefined and vague language.

- a 78. Incidentally, none of the expressions used in Section 66-A are defined. Even "criminal intimidation" is not defined—and the definition clause of the Information Technology Act, Section 2 does not say that words and expressions that are defined in the Penal Code will apply to this Act.
- b 79. Quite apart from this, as has been pointed out above, every expression used is nebulous in meaning. What may be offensive to one may not be offensive to another. What may cause annoyance or inconvenience to one may not cause annoyance or inconvenience to another. Even the expression "persistently" is completely imprecise—suppose a message is sent thrice, can it be said that it was sent "persistently"? Does a message have to be sent (say) at least eight times, before it can be said that such message is "persistently" sent? There is no demarcating line conveyed by any of these
- c expressions—and that is what renders the section unconstitutionally vague.
- d 80. However, the learned Additional Solicitor General argued before us that expressions that are used in Section 66-A may be incapable of any precise definition but for that reason they are not constitutionally vulnerable. He cited a large number of judgments in support of this submission. None of the cited judgments dealt with a section creating an offence which is saved despite its being vague and incapable of any precise definition. In fact, most of the judgments cited before us did not deal with criminal law at all. The few that did are dealt with hereinbelow. For instance, *Madan Singh v. State of Bihar*<sup>64</sup>, was cited before us. The passage cited from the aforesaid judgment is contained in para 19 of the judgment. The cited passage is not in the context of an argument that the word "terrorism" not being separately defined would, therefore, be struck down on the ground of vagueness. The cited passage was only in the context of upholding the conviction of the accused in that case. Similarly, in *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*<sup>65</sup>, the expression "insurgency" was said to be undefined and would defy a precise definition, yet it could be understood to mean breakdown of peace and tranquility as also a grave disturbance of public order so as to endanger the security of the State and its sovereignty. This again was said in the context of a challenge on the ground of legislative competence. The provisions of the Maharashtra Control of Organised Crime Act were challenged on the ground that they were outside the expression "public order" contained in Schedule VII List I Entry 1 of the Constitution of India. This contention was repelled by saying that the expression "public order" was wide enough to encompass cases of "insurgency". This case again had nothing to do with a challenge raised on the ground of vagueness.
- g 81. Similarly, in *State of M.P. v. Kedia Leather & Liquor Ltd.*<sup>66</sup>, SCC para 8 was cited to show that the expression "nuisance" appearing in Section

h 64 (2004) 4 SCC 622 : 2004 SCC (Cr) 1360  
65 (2010) 5 SCC 246  
66 (2003) 7 SCC 389 : 2003 SCC (Cr) 1642

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133 of the Code of Criminal Procedure was also not capable of precise definition. This again was said in the context of an argument that Section 133 of the Code of Criminal Procedure was impliedly repealed by the Water (Prevention and Control of Pollution) Act, 1974. This contention was repelled by saying that the areas of operation of the two provisions were completely different and they existed side by side being mutually exclusive. This case again did not contain any argument that the provision contained in Section 133 was vague and, therefore, unconstitutional. Similarly, in *State of Karnataka v. Appa Balu Ingale*<sup>67</sup>, the word "untouchability" was said not to be capable of precise definition. Here again, there was no constitutional challenge on the ground of vagueness.

82. In fact, two English judgments cited by the learned Additional Solicitor General would demonstrate how vague the words used in Section 66-A are. In *Director of Public Prosecutions v. Collins*<sup>40</sup>, the very expression "grossly offensive" is contained in Section 127(1)(1) of the U.K. Communications Act, 2003. A 61 year old man made a number of telephone calls over two years to the office of a Member of Parliament. In these telephone calls and recorded messages Mr Collins who held strong views on immigration made a reference to "Wogs", "Pakis", "Black bastards" and "Niggers". Mr Collins was charged with sending messages which were grossly offensive. The Leicestershire Justices dismissed the case against Mr Collins on the ground that the telephone calls were offensive but not grossly offensive. A reasonable person would not so find the calls to be grossly offensive. The Queen's Bench agreed and dismissed<sup>68</sup> the appeal filed by the Director of Public Prosecutions. The House of Lords reversed<sup>40</sup> the Queen's Bench decision stating: (*Collins case*<sup>40</sup>, WLR p. 2228, paras 9-10)

"9. The parties agreed with the rulings of the Divisional Court that it is for the justices to determine as a question of fact whether a message is grossly offensive, that in making this determination the justices must apply the standards of an open and just multi-racial society, and that the words must be judged taking account of their context and all relevant circumstances. I would agree also. Usages and sensitivities may change over time. Language otherwise insulting may be used in an unpejorative, even affectionate, way, or may be adopted as a badge of honour ('Old Contemptibles'). There can be no yardstick of gross offensiveness otherwise than by the application of reasonably enlightened, but not perfectionist, contemporary standards to the particular message sent in its particular context. The test is whether a message is couched in terms liable to cause gross offence to those to whom it relates.

10. In contrast with Section 127(2)(a) and its predecessor sub-sections, which require proof of an unlawful purpose and a degree of knowledge, Section 127(1)(a) provides no explicit guidance on the state of mind which must be proved against a defendant to establish an offence against the sub-section."

67 1995 Supp (4) SCC 469 : 1994 SCC (Cr) 1762

40 (2006) 1 WLR 2223 : (2006) 4 All ER 602 (HL)

68 *Director of Public Prosecutions v. Collins*, (2006) 1 WLR 308 : (2005) 3 All ER 326



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83. Similarly in *Chambers v. Director of Public Prosecutions*<sup>69</sup>, the Queen's Bench was faced with the following facts: (WLR p. 1833)

- a "Following an alert on the internet social network, Twitter, the defendant became aware that, due to adverse weather conditions, an airport from which he was due to travel nine days later was closed. He responded by posting several 'tweets' on Twitter in his own name, including the following: 'Crap! Robin Hood Airport is closed. You have got a week and a bit to get your shit together otherwise I am blowing the airport sky high!!' None of the defendant's 'followers' who read the posting was alarmed by it at the time. Some five days after its posting the defendant's tweet was read by the duty manager responsible for security at the airport on a general internet search for tweets relating to the airport. Though not believed to be a credible threat the matter was reported to the police. In interview the defendant asserted that the tweet was a joke and not intended to be menacing. The defendant was charged with sending by a public electronic communications network a message of a menacing character contrary to Section 127(1)(a) of the Communications Act, 2003. He was convicted in a Magistrates' Court and, on appeal, the Crown Court upheld the conviction, being satisfied that the message was 'menacing per se' and that the defendant was, at the very least, aware that his message was of a menacing character."
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84. The Crown Court was satisfied that the message in question was "menacing" stating that an ordinary person seeing the tweet would be alarmed and, therefore, such message would be "menacing". The Queen's Bench Division reversed the Crown Court stating: (*Director of Public Prosecutions case*<sup>69</sup>, WLR p. 1842, para 31)

- e "31. Before concluding that a message is criminal on the basis that it represents a menace, its precise terms, and any inferences to be drawn from its precise terms, need to be examined in the context in and the means by which the message was sent. The Crown Court was understandably concerned that this message was sent at a time when, as we all know, there is public concern about acts of terrorism and the continuing threat to the security of the country from possible further terrorist attacks. That is plainly relevant to context, but the offence is not directed to the inconvenience which may be caused by the message. In any event, the more one reflects on it, the clearer it becomes that this message did not represent a terrorist threat, or indeed any other form of threat. It was posted on "Twitter" for widespread reading, a conversation piece for the defendant's followers, drawing attention to himself and his predicament. Much more significantly, although it purports to address 'you', meaning those responsible for the airport, it was not sent to anyone at the airport or anyone responsible for airport security, or indeed any form of public security. The grievance addressed by the message is that the airport is closed when the writer wants it to be open. The
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69 (2013) 1 WLR 1833

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language and punctuation are inconsistent with the writer intending it to be or it to be taken as a serious warning. Moreover, as Mr Armson noted, it is unusual for a threat of a terrorist nature to invite the person making it to be readily identified, as this message did. Finally, although we are accustomed to very brief messages by terrorists to indicate that a bomb or explosive device has been put in place and will detonate shortly, it is difficult to imagine a serious threat in which warning of it is given to a large number of tweet 'followers' in ample time for the threat to be reported and extinguished."

85. These two cases illustrate how judicially trained minds would find a person guilty or not guilty depending upon the Judge's notion of what is "grossly offensive" or "menacing". In *Collins case*, both the Leicestershire Justices and two Judges of the Queen's Bench would have acquitted Collins whereas the House of Lords convicted him. Similarly, in the Chambers case, the Crown Court would have convicted Chambers whereas the Queen's Bench acquitted him. If judicially trained minds can come to diametrically opposite conclusions on the same set of facts it is obvious that expressions such as "grossly offensive" or "menacing" are so vague that there is no manageable standard by which a person can be said to have committed an offence or not to have committed an offence. Quite obviously, a prospective offender of Section 66-A and the authorities who are to enforce Section 66-A have absolutely no manageable standard by which to book a person for an offence under Section 66-A. This being the case, having regard also to the two English precedents cited by the learned Additional Solicitor General, it is clear that Section 66-A is unconstitutionally vague.

86. Ultimately, applying the tests referred to in *Chintaman Rao*<sup>16</sup> and *V.G. Row*<sup>17</sup> case, referred to earlier in the judgment, it is clear that Section 66-A arbitrarily, excessively and disproportionately invades the right of free speech and upsets the balance between such right and the reasonable restrictions that may be imposed on such right.

#### *Chilling Effect And Overbreadth*

87. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views"—such as the emancipation of women or the abolition of the caste system or whether certain members of a non-proselytizing religion should be allowed to bring

<sup>16</sup> *Chintaman Rao v. State of M.P.*, 1950 SCR 759 : AIR 1951 SC 118

<sup>17</sup> *State of Madras v. V.G. Row*, 1952 SCR 597 : AIR 1952 SC 196 : 1952 Cr LJ 966

persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66-A. In point of fact, Section 66-A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.

88. Incidentally, some of our judgments have recognised this chilling effect of free speech. In *R. Rajagopal v. State of T.N.*<sup>70</sup>, this Court held: (SCC pp. 646-47, para 19)

"19. The principle of *Sullivan*<sup>71</sup> was carried forward—and this is relevant to the second question arising in this case—in *Derbyshire County Council v. Times Newspapers Ltd.*<sup>72</sup>, a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in *Sunday Times* questioning the propriety of investments made for its superannuation fund. The articles were headed 'Revealed: Socialist tycoon deals with Labour Chief' and 'Bizarre deals of a council leader and the media tycoon'. A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in *Attorney General v. Guardian Newspapers Ltd. (No. 2)*<sup>73</sup> popularly known as 'Spycatcher case', the House of Lords had opined that 'there are rights available to private citizens which institutions of ... Government are not in a position to exercise unless they can show that it is in the public interest to do so'. It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was 'contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech' and further that action for defamation or threat of such action 'inevitably have an inhibiting effect on freedom of speech'. The learned Law Lord referred to the decision of the United States Supreme Court in *New York Times Co. v. Sullivan*<sup>71</sup> and certain other decisions of American Courts and observed—and this is significant for our purposes—

'while these decisions were related most directly to the provisions of the American Constitution concerned with securing

70 (1994) 6 SCC 632

71 *New York Times Co. v. Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964)

72 1993 AC 534 : (1993) 2 WLR 449 : (1993) 1 All ER 1011 (HL)

73 (1990) 1 AC 109 : (1988) 3 WLR 776 : (1988) 3 All ER 545 (HL)

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freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.' a

Accordingly, it was held that the action was not maintainable in law."

(emphasis in original)

89. Also in *S. Khushboo v. Kanniammal*<sup>6</sup>, this Court said: (SCC p. 620, para 47) b

"47. In the present case, the substance of the controversy does not really touch on whether premarital sex is socially acceptable. Instead, the real issue of concern is the disproportionate response to the appellant's remarks. If the complainants vehemently disagreed with the appellant's views, then they should have contested her views through the news media or any other public platform. The law should not be used in a manner that has chilling effects on the 'freedom of speech and expression'." c

90. That the content of the right under Article 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by *Reno case*<sup>52</sup> and by *Ministry of Information & Broadcasting, Govt. of India v. Cricket Assn. of Bengal*<sup>20</sup>, SCC at para 78 already referred to. It is thus clear that not only are the expressions used in Section 66-A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms. For example, see, *Kedar Nath Singh v. State of Bihar*<sup>34</sup>, SCR at pp. 808-09. In point of fact, judgments of the Constitution Bench of this Court have struck down sections which are similar in nature. A prime example is the section struck down in the first *Ram Manohar Lohia case*<sup>15</sup>, namely, Section 3 of the U.P. Special Powers Act, where the persons who "instigated" expressly or by implication any person or class of persons not to pay or to defer payment of any liability were punishable. This Court specifically held that under the section a wide net was cast to catch a variety of acts of instigation ranging from friendly advice to systematic propaganda. It was held that in its wide amplitude, the section takes in the innocent as well as the guilty, bona fide and mala fide advice and whether the person be a legal adviser, a friend or a well-wisher of the person instigated, he cannot escape the tentacles of the section. The Court held that it was not possible to predicate with some kind of precision the different categories of instigation falling within or without d e f g

6 (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299

52 *Reno v. American Civil Liberties Union*, 521 US 844 : 138 L. Ed 2d 874 (1997)

20 (1995) 2 SCC 161

34 1962 Supp (2) SCR 769 : AIR 1962 SC 955 : (1962) 2 Cri LJ 103

15 *Supt., Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002 h



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the field of constitutional prohibitions. It further held that the section must be declared unconstitutional as the offence made out would depend upon factors which are uncertain.

a 91. In *Kameshwar Prasad v. State of Bihar*<sup>12</sup>, Rule 4-A of the Bihar Government Servants Conduct Rules, 1956 was challenged. The Rule states, "No government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

b 92. The aforesaid Rule was challenged under Articles 19(1)(a) and (b) of the Constitution. The Court followed the law laid down in *Ram Manohar Lohia case*<sup>15</sup> and accepted the challenge. It first held that demonstrations are a form of speech and then held: (*Kameshwar Prasad case*<sup>12</sup>, SCR p. 374 : AIR p. 1168, para 5)

c "... The approach to the question regarding the constitutionality of the rule should be whether the ban that it imposes on demonstrations would be covered by the limitation of the guaranteed rights contained in Articles 19(2) and 19(3). In regard to both these clauses the only relevant criteria which has been suggested by the respondent State is that the rule is framed 'in the interest of public order'. A demonstration may be defined as 'an expression of one's feelings by outward signs'. A demonstration such as is prohibited by, the rule may be of the most innocent type—peaceful orderly such as the mere wearing of a badge by a government servant or even by a silent assembly say outside office hours—demonstrations which could in no sense be suggested to involve any breach of tranquility, or of a type involving incitement to or capable of leading to disorder. If the rule had confined itself to demonstrations of the type which would lead to disorder then the validity of that rule could have been sustained but what the rule does is the imposition of a blanket-ban on all demonstrations of whatever type—innocent as well as otherwise—and in consequence its validity cannot be upheld."

d 93. The Court further went on to hold that remote disturbances of public order by demonstration would fall outside Article 19(2). The connection with public order has to be intimate, real and rational and should arise directly from the demonstration that is sought to be prohibited. Finally, the Court held: (*Kameshwar Prasad case*<sup>12</sup>, SCR p. 384 : AIR p. 1172, para 17)

e "... The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration—be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result."

f 94. These two Constitution Bench decisions bind us and would apply directly on Section 66-A. We, therefore, hold that the section is

h <sup>12</sup> 1962 Supp (3) SCR 369 : AIR 1962 SC 1166

<sup>15</sup> *Sgt., Central Prison v. Ram Manohar Lohia*, (1960) 2 SCR 821 : AIR 1960 SC 633 : 1960 Cri LJ 1002

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unconstitutional also on the ground that it takes within its sweep protected speech and speech that is innocent in nature and is liable therefore to be used in such a way as to have a chilling effect on free speech and would, therefore, have to be struck down on the ground of overbreadth. a

*Possibility of an Act being abused is not a ground to test its validity*

95. The learned Additional Solicitor General cited a large number of judgments on the proposition that the fact that Section 66-A is capable of being abused by the persons who administer it is not a ground to test its validity if it is otherwise valid. He further assured us that this Government was committed to free speech and that Section 66-A would not be used to curb free speech, but would be used only when excesses are perpetrated by persons on the rights of others. In *Collector of Customs v. Nathella Sampathu Chetty*<sup>74</sup>, this Court observed: (SCR pp. 825-26 : AIR p. 332, para 33) b

"... This Court has held in numerous rulings, to which it is unnecessary to refer, that the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void. Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated: c

'If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably' and treating this as a ground for holding the statute invalid Viscount Simonds observed in *Belfast Corpn. v. O.D. Cars Ltd.*<sup>75</sup>, AC at pp. 520-21: d

'... it appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. ... If it is not so exercised [i.e. if the powers are abused], it is open to challenge, and there is no need for express provision for its challenge in the statute.' e

The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." f

<sup>74</sup> (1962) 3 SCR 786 : AIR 1962 SC 316 : (1962) 1 Cr LJ 364 h

<sup>75</sup> 1960 AC 490 : (1960) 2 WLR 148 : (1960) 1 All ER 65 (HL)

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96. In this case, it is the converse proposition which would really apply if the learned Additional Solicitor General's argument is to be accepted. If
- a Section 66-A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66-A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66-A must be judged on its own merits
  - b without any reference to how well it may be administered.

*Severability*

97. The argument of the learned Additional Solicitor General on this score is reproduced by us verbatim from one of his written submissions:

- c "Furthermore it is respectfully submitted that in the event of Hon'ble Court not being satisfied about the constitutional validity of either any expression or a part of the provision, the Doctrine of Severability as enshrined under Article 13 may be resorted to."

98. The submission is vague: the learned Additional Solicitor General does not indicate which part or parts of Section 66-A can possibly be saved. This Court in *Romesh Thappar v. State of Madras*<sup>2</sup> repelled a contention of
- d severability when it came to the courts enforcing the fundamental right under Article 19(1)(a) in the following terms: (SCR p. 603 : AIR p. 129, para 13)

- e "... It was, however, argued that Section 9(1-A) could not be considered wholly void, as, under Article 13(1), an existing law inconsistent with a fundamental right is void only to the extent of the inconsistency and no more. Insofar as the securing of the public safety or the maintenance of public order would include the security of the State, the impugned provision, as applied to the latter purpose, was covered by clause (2) of Article 19 and must, it was said, be held to be valid. We are unable to accede to this contention. Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such right, it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void. In other words, clause (2) of Article 19 having allowed the imposition of
- g restrictions on the freedom of speech and expression only in cases where danger to the State is involved, an enactment, which is capable of being applied to cases where no such danger could arise, cannot be held to be constitutional and valid to any extent."

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<sup>2</sup> 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cr LJ 1514



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99. It has been held by us that Section 66-A purports to authorise the imposition of restrictions on the fundamental right contained in Article 19(1)(a) in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action. We have held following *K.A. Abbas case*<sup>59</sup> that the possibility of Section 66-A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void. *Romesh Thappar case*<sup>2</sup> was distinguished in *R.M.D. Chamarbaugwalla v. Union of India*<sup>76</sup> in the context of a right under Article 19(1)(g) as follows: (SCR pp. 948-49 : AIR p. 636, para 20)

"20. In *Romesh Thappar v. State of Madras*<sup>2</sup>, the question was as to the validity of Section 9(1-A) of the Madras Maintenance of Public Order Act 23 of 1949. That section authorised the Provincial Government to prohibit the entry and circulation within the State of a newspaper 'for the purpose of securing the public safety or the maintenance of public order'. Subsequent to the enactment of this statute, the Constitution came into force, and the validity of the impugned provision depended on whether it was protected by Article 19(2), which saved 'existing law insofar as it relates to any matter which undermines the security of or tends to overthrow the State.' It was held by this Court that as the purposes mentioned in Section 9(1-A) of the Madras Act were wider in amplitude than those specified in Article 19(2), and as it was not possible to split up Section 9(1-A) into what was within and what was without the protection of Article 19(2), the provision must fail in its entirety. That is really a decision that the impugned provision was on its own contents inseverable. It is not an authority for the position that even when a provision is severable, it must be struck down on the ground that the principle of severability is inadmissible when the invalidity of a statute arises by reason of its contravening constitutional prohibitions. It should be mentioned that the decision in *Romesh Thappar v. State of Madras*<sup>2</sup> was referred to in *State of Bombay v. F.N. Balsara*<sup>77</sup> and *State of Bombay v. United Motors (India) Ltd.*<sup>78</sup> (SCR at pp. 1098-99) and distinguished."

100. The present being a case of an Article 19(1)(a) violation, *Romesh Thappar*<sup>2</sup> judgment would apply on all fours. In an Article 19(1)(g) challenge, there is no question of a law being applied for purposes not sanctioned by the Constitution for the simple reason that the eight subject-matters of Article 19(2) are conspicuous by their absence in Article 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66-A does not fall within any of the subject-matters contained in Article 19(2) and the possibility of its being applied for purposes outside those subject-matters is clear. We, therefore, hold that no part of Section 66-A is severable and the provision as a whole must be declared unconstitutional.

<sup>59</sup> *K.A. Abbas v. Union of India*, (1970) 2 SCC 780

<sup>2</sup> *Romesh Thappar v. State of Madras*, 1950 SCR 594 : AIR 1950 SC 124 : (1950) 51 Cr LJ 1514

<sup>76</sup> 1957 SCR 930 : AIR 1957 SC 628

<sup>77</sup> 1951 SCR 682 : AIR 1951 SC 318 : (1951) 52 Cr LJ 1361

<sup>78</sup> 1953 SCR 1069 : AIR 1953 SC 252

*Article 14*

101. The counsel for the petitioners have argued that Article 14 is also
- a infringed in that an offence whose ingredients are vague in nature is arbitrary and unreasonable and would result in arbitrary and discriminatory application of the criminal law. Further, there is no intelligible differentia between the medium of print, broadcast, and real live speech as opposed to speech on the internet and, therefore, new categories of criminal offences cannot be made on this ground. Similar offences which are committed on the internet have a
  - b three-year maximum sentence under Section 66-A as opposed to defamation which has a two-year maximum sentence. Also, defamation is a non-cognizable offence whereas under Section 66-A the offence is cognizable.

102. We have already held that Section 66-A creates an offence which is vague and over broad, and, therefore, unconstitutional under Article 19(1)(a) and not saved by Article 19(2). We have also held that the wider range of
- c circulation over the internet cannot restrict the content of the right under Article 19(1)(a) nor can it justify its denial. However, when we come to discrimination under Article 14, we are unable to agree with the counsel for the petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear—the internet gives any individual a platform
  - d which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Article 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject-matter of challenge in these
  - e petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Article 14 must fail.

*Procedural unreasonableness*

103. One other argument must now be considered. According to the
- f petitioners, Section 66-A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available under Section 199 CrPC would not be available for a like offence committed under Section 66-A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made
  - g by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Sections 95 and 96 CrPC are also absent when it comes to Section 66-A. For example, where any newspaper, book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is
  - h seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be

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seized but under Section 96 any person having any interest in such newspaper, book or document may within two months from the date of a publication seizing such documents, books or newspapers apply to the High Court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court. a

104. It is clear that Sections 95 and 96 of the Criminal Procedure Code reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject-matters contained in Article 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Article 19(2). Further, Section 196 CrPC states: b

*"196. Prosecution for offences against the State and for criminal conspiracy to commit such offence.—(1) No Court shall take cognizance of—* c

(a) any offence punishable under Chapter VI or under Section 153-A, Section 295-A or sub-section (1) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence, or d

(c) any such abetment, as is described in Section 108-A of the Indian Penal Code (45 of 1860),

except with the previous sanction of the Central Government or of the State Government.

(1-A) No Court shall take cognizance of— e

(a) any offence punishable under Section 153-B or sub-section (2) or sub-section (3) of Section 505 of the Indian Penal Code, 1860 (45 of 1860), or

(b) a criminal conspiracy to commit such offence,

except with the previous sanction of the Central Government or of the State Government or of the District Magistrate. f

(2) No court shall take cognizance of the offence of any criminal conspiracy punishable under Section 120-B of the Indian Penal Code (45 of 1860), other than a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings: g

Provided that where the criminal conspiracy is one to which the provisions of Section 195 apply, no such consent shall be necessary.

(3) The Central Government or the State Government may, before according sanction under sub-section (1) or sub-section (1-A) and the District Magistrate may, before according sanction under sub-section (1-A) and the State Government or the District Magistrate may, before giving consent under sub-section (2), order a preliminary investigation by a police h

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officer not being below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of Section 155."

- a 105. Again, for offences in the nature of promoting enmity between different groups on grounds of religion, etc. or offences relating to deliberate and malicious acts intending to outrage religious feelings or statements that create or promote enmity, hatred or ill will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked under Section 66-A instead of the aforesaid sections.
- b

106. Having struck down Section 66-A on substantive grounds, we need not decide the procedural unreasonableness aspect of the section.

*Section 118 of the Kerala Police Act*

- c 107. The learned counsel for the petitioner in Writ Petition No. 196 of 2014 assailed clause (d) of Section 118 which is set out hereinbelow:

"118. *Penalty for causing grave violation of public order or danger.*—Any person who—

- d (d) causes annoyance to any person in an indecent manner by statements or verbal or comments or telephone calls or calls of any type or by chasing or sending messages or mails by any means; or

shall, on conviction be punishable with imprisonment for a term which may extend to three years or with fine not exceeding ten thousand rupees or with both."

- e 108. The learned counsel first assailed the section on the ground of legislative competence stating that this being a Kerala Act, it would fall outside Entries 1 and 2 of List II and fall within Entry 31 of List I. In order to appreciate the argument we set out the relevant entries:

"LIST I

- f 31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

LIST II

- g 1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power).

2. Police (including railway and village police) subject to the provisions of Entry 2-A of List I."

- h The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II. In addition, Section 118 would also fall within Entry 1 of List II in that as its marginal note tells us it deals with penalties for causing grave violation of public order or danger.

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109. It is well settled that a statute cannot be dissected and then examined as to under what field of legislation each part would separately fall. In *A.S. Krishna v. State of Madras*<sup>79</sup>, the law is stated thus: (SCR p. 410 : a  
AIR p. 303, para 12)

"The position, then, might thus be summed up: when a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not." b c

110. It is, therefore, clear that the Kerala Police Act as a whole and Section 118 as part thereof falls in pith and substance within List II Entry 2, notwithstanding any incidental encroachment that it may have made on any other Entry in List I. Even otherwise, the penalty created for causing annoyance in an indecent manner in pith and substance would fall within List III Entry 1 which speaks of criminal law and would thus be within the competence of the State Legislature in any case. d

111. However, what has been said about Section 66-A would apply directly to Section 118(d) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and over breadth, that led to the invalidity of Section 66-A, and for the reasons given for striking down Section 66-A, Section 118(d) also violates Article 19(1)(a) and not being a reasonable restriction on the said right and not being saved under any of the subject-matters contained in Article 19(2) is hereby declared to be unconstitutional. e

*Section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009* f

112. Section 69-A of the Information Technology Act has already been set out in para 2 of the judgment. Under sub-section (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the Official Gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69-A of the Act. Under Rule 4, every organisation as defined under Rule 2(g) (which refers to the Government of India, State Governments, Union Territories and agencies of the Central g

<sup>79</sup> 1957 SCR 399 : AIR 1957 SC 297 : 1957 Cri LJ 409 h

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- Government as may be notified in the Official Gazette by the Central Government)—is to designate one of its officers as the “Nodal Officer”.
- a Under Rule 6, any person may send their complaint to the “Nodal Officer” of the organisation concerned for blocking, which complaint will then have to be examined by the organisation concerned regard being had to the parameters laid down in Section 69-A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain
  - b any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an organisation or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in Section 69-A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a
  - c Committee of Government Personnel who under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information. If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The Committee then examines the request and is to consider whether the
  - d request is covered by Section 69-A(1) and is then to give a specific recommendation in writing to the Nodal Officer of the organisation concerned. It is only thereafter that the Designated Officer is to submit the Committee’s recommendation to the Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government
  - e or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the
  - f Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, under Rule 14 a Review Committee shall meet at least once in two months
  - g and record its findings as to whether directions issued are in accordance with Section 69-A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.
  - h 113. The learned counsel for the petitioners assailed the constitutional validity of Section 69-A, and assailed the validity of the 2009 Rules. According to the learned counsel, there is no pre-decisional hearing afforded

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by the Rules particularly to the "originator" of information, which is defined under Section 2(za) of the Act to mean a person who sends, generates, stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person. Further, procedural safeguards such as which are provided under Sections 95 and 96 of the Code of Criminal Procedure are not available here. Also, the confidentiality provision was assailed stating that it affects the fundamental rights of the petitioners.

114. It will be noticed that Section 69-A unlike Section 66-A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Article 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.

115. The Rules further provide for a hearing before the Committee set up—which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-section (3) of Section 69-A.

116. Merely because certain additional safeguards such as those found in Sections 95 and 96 CrPC are not available does not make the Rules constitutionally infirm. We are of the view that the Rules are not constitutionally infirm in any manner.

**Section 79 and the Information Technology (Intermediary Guidelines) Rules, 2011**

117. Section 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfil the conditions of the section. Section 79 states:

*"79. Exemption from liability of intermediary in certain cases.—(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.*

*(2) The provisions of sub-section (1) shall apply if—*

*(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or*

*(b) the intermediary does not—*

*(i) initiate the transmission,*

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- (ii) select the receiver of the transmission, and
- (iii) select or modify the information contained in the transmission;
- a (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if—

- b (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;
- c (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

*Explanation.*—For the purposes of this section, the expression ‘third party information’ means any information dealt with by an intermediary in his capacity as an intermediary.”

- d 118. Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary’s computer resource but he has also to inform all users of the various matters set out in Rule 3(2). Since Rules 3(2) and 3(4) are important, they are set out hereinbelow:

“3. *Due diligence to be observed by intermediary.*—The intermediary shall observe following due diligence while discharging his duties, namely—

- e \* \* \*
- (2) Such rules and regulations, terms and conditions or user agreement shall inform the users of computer resource not to host, display, upload, modify, publish, transmit, update or share any information that—
- f (a) belongs to another person and to which the user does not have any right to;
- (b) is grossly harmful, harassing, blasphemous, defamatory, obscene, pornographic, paedophilic, libellous, invasive of another’s privacy, hateful, or racially, ethnically objectionable, disparaging, relating or encouraging money laundering or gambling, or otherwise unlawful in any manner whatever;
- g (c) harm minors in any way;
- (d) infringes any patent, trademark, copyright or other proprietary rights;
- (e) violates any law for the time being in force;
- h (f) deceives or misleads the addressee about the origin of such messages or communicates any information which is grossly offensive or menacing in nature;



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(g) impersonate another person;

(h) contains software viruses or any other computer code, files or programs designed to interrupt, destroy or limit the functionality of any computer resource; a

(i) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign states, or public order or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting any other nation. b

\* \* \*

(4) The intermediary, on whose computer system the information is stored or hosted or published, upon obtaining knowledge by itself or been brought to actual knowledge by an affected person in writing or through e-mail signed with electronic signature about any such information as mentioned in sub-rule (2) above, shall act within thirty-six hours and where applicable, work with user or owner of such information to disable such information that is in contravention of sub-rule (2). Further the intermediary shall preserve such information and associated records for at least ninety days for investigation purposes." c

119. The learned counsel for the petitioners assailed Rules 3(2) and 3(4) on two basic grounds. Firstly, the intermediary is called upon to exercise its own judgment under sub-rule (4) and then disable information that is in contravention of sub-rule (2), when intermediaries by their very definition are only persons who offer a neutral platform through which persons may interact with each other over the internet. Further, no safeguards are provided as in the 2009 Rules made under Section 69-A. Also, for the very reasons that Section 66-A is bad, the petitioners assailed sub-rule (2) of Rule 3 saying that it is vague and over broad and has no relation with the subjects specified under Article 19(2). d

120. One of the petitioners' counsel also assailed Section 79(3)(b) to the extent that it makes the intermediary exercise its own judgment upon receiving actual knowledge that any information is being used to commit unlawful acts. Further, the expression "unlawful acts" also goes way beyond the specified subjects delineated in Article 19(2). e

121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed—one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules. f g h

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122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).
123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid.
124. In conclusion, we may summarise what has been held by us above:
- 124.1. Section 66-A of the Information Technology Act, 2000 is struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2).
- 124.2. Section 69-A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 are constitutionally valid.
- 124.3. Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.
- 124.4. Section 118(d) of the Kerala Police Act is struck down being violative of Article 19(1)(a) and not saved by Article 19(2).
125. All the writ petitions are disposed in the above terms.